THE

HISTORY

OF

THE RISE AND PROGRESS

OF THE

Judicial or Adawlut System,

AS ESTABLISHED

FOR THE ADMINISTRATION OF JUSTICE,

UNDER THE

Presidency of Bengal.

PART II.

AN INQUIRY

INTO THE SUPPOSED EXISTENCE

OF THE

TRIAL BY JURY IN INDIA,

WITH

SOME ACCOUNT OF THE LATE PROPOSED ALTERATIONS

IN THE

Judicial System,

UNDER THE PRESIDENCY OF FORT ST. GEORGE.

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PREFACE.

THE System, as established by MARQUIS CORNWALLIS, for the Administration of Justice in Bengal, in the year 1793, has lately been made the subject of severe animadversion. It appeared to the Writer of this Inquiry, that the objections had chiefly arisen from mistaking some errors, which have occurred in forwarding the progress of the Regulations, for original defects in the plan itself. Contingent errors creep into every system, and, from being suffered to remain, come in time to be regarded as integral parts of it. No institution can be long preserved from decay, but by often reverting to its original principles, and marking where these have been departed from.

The object of the present Inquiry, therefore, is to trace the origin of the Judicial System, to illustrate its principles, and to mark the occasional deviations which have been made from these.

The observations are confined to the Civil Administration of Justice, and are seldom brought farther down than the year 1806. Few alterations have been made since that period, and these when material are noticed.

The Criminal Code may perhaps form the subject of a further Inquiry.

The Regulations for the Adawlut Courts in Bengal, and the other Provinces immediately subject to that Presidency, amount to more than seven volumes in folio. An examination of every particular law would extend this publication to a bulk too inconvenient for easy reference. After noticing the various Plans for the Administration of Justice in Bengal, from the acquirement of the Dewannee, or Civil Government, in 1769, to the year 1793, a few general heads of the Regulations passed in that and the subsequent years shall be selected for more particular comment. The appeals, the tax on law papers, and the too great facility which has been given to the

enactment of new laws, with the evils of expence and delay which have arisen from these, appear to form the chief objections to the system.

The natural arrangement of the subject will divide the Inquiry into separate heads, as carrying reference to the different alterations which the System has undergone. The early stages of the Judicial Establishments afford little matter for application to the present era, and will therefore be rapidly passed over.

HISTORY

OF

THE ADAWLUT SYSTEM.

CHAPTER I.

Of the Period at which the Company acquired the Dewannee.

THE Dewannee, or right to the collection of the revenue, and the administration of civil justice, in the provinces of Bengal, Bahar, and Orissa, was granted to the India Company in perpetuity, by the Emperor of Delhi, in the year 1765.

By this grant the Company were understood to be, as the name implies, the agents, or stewards, of the Mogul. The revenue appears to have been collected for some years, and justice administered, by the Government of Bengal, through the medium of natives of the country.

In the year 1766, Lord Clive took his seat as Dewan, or Collector of the Revenue, in a Durbar held near Moorshedabad; whilst the Nabob sat in conjunction with him as Nazim, or Criminal Magistrate.* But the Nawab Nazim soon sunk into a pensioner of state, although he was allowed to retain the name and dignities of his office. A Resident at the Nawab's court inspected the management of the Naib Dewan, whilst the Chief of Patna superintended the collections of Bahar, which had been placed under the management of a Native Officer. The districts of Calcutta, Burdwan, Midnapore, and Chittagong, which had been acquired by former grants, were placed under the controul of Europeans.

In the year 1770, Councils were appointed at Patna and Moorshedabad, with Servants under them, to superintend the administration of justice and the collection of the revenue. These last, from the nature of their office, were styled Supervisors. Great abuses are said to have attended this state of government: the European Servants possessed but an imperfect acquaintance of the language and manners of the Natives, and the authority of the Government was too feeble

* The word Nazim does not perhaps, in its proper signification, imply more than Superintendent or Governor; but we have always connected the term Nazim and Nizamut with the administration of criminal justice.

to enforce a strict obedience to their orders. This system, however, was a natural consequence of our sudden and singular acquisition of power in the country.

CHAPTER II.

Second Period.—When the Company assumed the entire care and management of the Revenue.

THE year 1772 is distinguished by the resolution which the Company express "to stand "forth as Dewan," and, by the agency of the Company's Servants, to take upon themselves the entire care and management of the revenues.

The Naib Dewan and his office were accordingly abolished.

A Committee was appointed in Bengal, by order of the Court of Directors, consisting of the Governor (Mr. Hastings) and four Members of Council, to enquire into the administration of justice amongst the Natives. Their Report exhibits a very full detail of the Mahometan Law Courts and Police Establishment.

The observations which are dispersed throughout the Report are marked with the learning of a scholar, and the strong sense by which the President of the Committee was distinguished.

It would afford, however, little matter for instruction to follow the Report in all its details of an establishment which no longer exists, and which, from its acknowledged defects, is never likely to be revived. After describing the various gradations of the Mahometan Law Courts, the Report observes: "As all defective institu-
" tions soon degenerate, by use, into that form to
" which they are inclined by the unequal preva-
" lence of their component parts, so these courts
" are never known to adhere to their prescribed
" bounds, but when restrained by the vigilance
" of a wiser ruler than commonly falls to the lot
" of despotic states; at all other times, not only
" the civil courts encroach on each other's au-
" thority, but both civil and criminal often take
" cognizance of the same subjects; or their
" power gradually becomes weak and obsolete,
" through their own abuses and the usurpations
" of influence." It then proceeds to state, that two of these courts had, for some years, been considered as judges of the same causes, whether of real or personal property; and that the parties make their application as chance, caprice, interest, or the superior weight and authority of either, directed their choice. It points out the tedious process of the courts, of which the consequences are, in many cases, more ruinous than an arbitrary decision could be, if passed without any law or process whatever.

A plan was delivered in by this Committee for the establishment in each provincial Division, or Collectorship, of a Civil and Criminal Tribunal, under the designation of Moffusil Dewannee Adawlut, and Foujdary Adawlut. These were to be regulated by the laws and usages of the Natives, under the superintendence of an European Gentleman; who, from his being also vested with the collection of the revenue, was to be styled Collector, in place of Supervisor. He was to be assisted, or perhaps guided, in his decisions, by a regular establishment of Law Officers. An appeal lay from this to two superior courts, which were to be fixed at the seat of Government. The first of these was called the Dewannee Sudder Adawlut, or Chief Court of Civil Cognizance, and the other was styled the Nizamut Sudder Adawlut, or Chief Court of Criminal Cognizance. The Civil Court was to be superintended by the President or Governor, with two Members of the Council.

A Chief Officer, appointed on the part of the Nazim, was to preside in the Nizamut Adawlut, attended by a regular establishment of Mahometan Judges. They were to revise their sentences sent from the District Criminal Court, and to prepare the sentence for the warrant of the Nazim. Over this court the President and Council exercised a certain controul. Mr. Hast-

ings appears to have presided in it for about eighteen months; but, from the multiplicity of business, resigned the situation. The court was then removed back to Moorshédabad, where it had originally sat: it was placed under the charge of Mahomed Reza Khan, in his capacity of Nazim.

The decree of the Provincial Court was final on the sum of five hundred rupees. The head Farmer of the Pergunnah, or District, held also a final judgment to the amount of ten rupees. Injunctions were established against summoning the husbandmen during certain months connected with the agriculture of the country. The regulations for these courts are comprised in thirty-seven paragraphs, or rules, the whole not amounting to sixteen quarto pages. "The Committee " of Circuit describe their plan as being founded " on the plain principles of experience and com- " mon observation, without the advantages which " an intimate knowledge of the theory of law " might have afforded us. We have endea- " voured to adapt our regulations to the man- " ners and understandings of the people, and " exigencies of the country, adhering, as closely " as we are able, to their ancient usages and " institutions."

Many of these rules still exist, as living laws, in the body of the great modern code of Bengal:

but the constitution itself of the courts was of short duration, and was made to give way to a new order of things in 1774, having only survived a period of two years.

CHAPTER III.

Third Period.—That of the Provincial Councils.

IN the year 1774 the Collectors appear to have been abolished, and Provincial Councils established in the six great divisions of Calcutta, Burdwan, Dacca, Moorshedabad, Dinagepore, and Patna.

These Councils were made to consist of five Members selected from the Civil Service, with a due regard to seniority and attainments. They superintended the joint departments of revenue, trade, and the administration of justice. The judicial functions were understood to be exercised by Native Judges. An establishment of a Cauzee, Muftee, and Pundit, was attached to every Council. These officers naturally dictated the law, in the first commencement of our government; but as the knowledge of the European Servants became more improved, they occasionally corrected the judgment of the Native Officers, under the authority of former decisions, or written expositions of the law.

The constitution of these Provincial Councils, if examined in reference to general principles, will appear defective. Their administration of justice was, however, not unsuited to the manners and habits of the people: it was simple in its process, speedy in the determination of causes, and productive of little expence to the parties. Every man pleaded his own cause, if he chose to do so, or employed a Native Attorney, or Vakeel, to appear for him. The expences attending on a cause is stated to have amounted to about five shillings (two rupees) to each of the parties. A brief note of the opinions of the Native Law Officers was entered on the minutes of the Council, with such particulars as the discretion of the European Magistrates might dictate, in elucidation of the subject; but a complete record was preserved in the native language of all the process. An appeal lay from the decision of the Council, in all cases exceeding the value of one thousand rupees, to the general Government of the Country, in their capacity of Sudder Adawlut.

By a reference to the examinations that were taken, in the year 1780, in Parliament, as to the due administration of justice in Bengal and Bahar, it does not appear that any particular complaints or dissatisfaction prevailed against the system. All the witnesses, amongst whom are to be found the names of some of the most

respectable and best-informed men that ever visited India, (such as Major Reynell, Mr. Boughton Rouse, and Sir Philip Francis), bear testimony to the integrity and intelligence with which the different functions were discharged. "Major Reynell being asked, If the natives were "dissatisfied with the course of justice, as "administered according to their own laws and "usages? he said, By no means, and by what he "has learnt from them, the administration of "justice in their country courts is just the same "now as it was under the Mahometan govern-"ment: that he believes they do not desire a "better; nor does he suppose they ever did, "because they are so exceedingly attached to "their own manners and customs that they have "scarce an idea of a better mode. Being asked, "Whether they are not considered as entirely "under the influence of English gentlemen, who "preside in the Provincial Courts? he said, "They are, in common with all the rest of the "inhabitants of the province; but that the peo-"ple do not complain of not obtaining justice "on account of the influence of the Provincial "Council over the Cauzees and Muftees." *

* Report from the Select Committee of the House of Commons, Patna cause, page 20. See also Sixth Report of Select Committee, Evidence of Major Scott, page 9; Evidence of Mr. Francis, pages 10 and 11; Evidence of Mr. Harwood, page 14;

Materials are not afforded to account for a change having taken place in this system; but, considering the great success which attended its administration, no change certainly ought to have been admitted, but upon grave and well considered reasons, distinctly stated to the superior authorities in Europe. The Committee of the House of Commons record their opinion on this change in the following terms. "Your "Committee find, that within less than four "months after Mr. Francis's departure, the Go- "vernor General, without any previous inquiry "by the Council General into the advantages or "disadvantages of the measure, suddenly re- "solved upon the recall and abolition of the "Provincial Councils, after they have been esta- "blished for almost nine years,* and had received "the approbation of the Court of Directors. "Your Committee consider this act, in many "points of view, as a very unjustifiable and dan- "gerous innovation." †

The gentlemen who gave evidence on this occasion were of different parties, and opposite feelings as to most other questions of India policy, yet they united in bearing testimony to

Evidence of Mr. Baber, page 17; Evidence of Mr. Boughton Rouse, pages 18 and 19; Opinion of the Committee, page 38.

* This is an error: they had subsisted only six years.

† Select Committee, Sixth Report, page 38.

the pure and speedy administration of justice by these Courts.*

The only reason assigned by Mr. Hastings for this change was founded on a regard to economy.

* "Mr. B. Rouse being asked whether he did not preside in the Dewannee Adawlut in Calcutta, and how long? he said, He did near two years. And being asked, Whether there was much business in that court, and many appeals? he said, The constitution of that court was somewhat different from the Provincial Adawlut, as an appeal was allowed to the Governor and Council, upon all sums exceeding five hundred rupees (or fifty pounds): to the best of his recollection, the number of decrees passed during the period above-mentioned was between two and three thousand. The appeals presented were, he thinks, about twenty-five.

"Being asked, How many of these were reversed? he said, He does not recollect any one was reversed, but in one case there was a slight alteration made in the interest adjudged by the decree of the inferior court. Being asked, What might be the general expence of the trial of causes in that court? he said, In the establishment of the Judicial Cutcherry, which preceded that court, there was a charge of five per cent. which was paid to the Company, with some inconsiderable fees to the officers. The tax of five per cent. was afterwards abolished. As to other expences of a suit, such as the employing of vakeels, or agents, the bringing of witnesses from different parts of the country, &c. which must be paid by the litigating parties, it would be impossible to estimate them; but by far the greatest part of the causes would be decided without an expence of five shillings to either party."—*Evidence of Mr. B. Rouse, page* 18, *Sixth Report Select Committee.*

CHAPTER IV.

Fourth Period.—Of the abolition of the Provincial Councils, and the appointment of Sir Elijah Impey to be President of the Sudder Dewannee Adawlut, which took place on the 25th of November, 1780.

ON the 28th of March, 1780, the Calcutta Government passed a body of Regulations, amounting to forty-three in number, but not exceeding five folio pages, for the administration of justice. Of these it is only necessary to notice the following:—

The jurisdiction of the Provincial Council was confined to all matters of revenue.

In each of the grand divisions of Calcutta, Moorshedabad, Burdwan, Dacca, Purnea, and Patna, a court was established under the charge of one judge, designated the Superintendent of Dewannee Adawlut.

His jurisdiction was to be independent of the Provincial Council, and was to carry reference to all causes of a civil nature whatever, not being revenue.

His decree was final in all cases for sums not

exceeding one thousand rupees. The appeal lay, in cases exceeding the above amount, to the Sudder Dewannee Adawlut.

A commission of five per cent. on filing the bill of plaint, was exacted on all sums

Not exceeding . . .	1,000	rupees.
Ditto	5,000	ditto
Ditto	10,000	ditto
On all sums above . .	10,000	ditto

and varying according to the above amounts.

But the above plan had hardly been established, before the inconveniencies of the measure came to be felt, in the clashing of two separate jurisdictions within the same district. The Governor General accordingly expresses his opinion on this inconveniency, in the following minute of the 29th of September, 1780:—

"The institution of the new Courts of Dewan-
"nee Adawlut has already given occasion to
"very troublesome and alarming competitions
"between them and the Provincial Councils,
"and to much waste of time at this Board.
"These, however, manifest the necessity of giving
"a more than ordinary attention to these courts
"in the infancy of their establishment, that they
"might neither prevent the purposes, nor exceed
"the limits, of their jurisdiction, nor suffer en-
"croachments upon it.

"To effect these points would require such a
"laborious and almost unremitted application,

" that however urgent or important they may " appear, I should dread to bring them before " the consideration of the Board, unless I could " propose some expedient for that end, that " should not add to the weight of business with " which it is already overcharged.

" That which I have to offer, will, I hope, " prove rather a diminution of it."

This offer appears to have consisted in the nomination of Sir Elijah Impey, the Chief Justice of His Majesty's Supreme Court, to the superintendence of the Sudder Dewannee Adawlut.

This measure became the subject of much comment and censure in Europe. But it is needless to enter here into a detail of the objections to a measure which, in all probability, will never be repeated, and which took place under local and singular circumstances of hardly possible recurrence.* It may be sufficient to observe, that the acceptance of the salary from the Company was generally condemned in England.

It was objected to the appointment that he could not longer take cognizance, in his capacity of Chief Judge, of irregular acts done by the Provincial Courts. But it was overlooked, that

* The subject is exhausted in the first volume of the Report of the Select Committee, p. 35.

the occurrence of any such would become less frequent, when their proceedings were guided by the instructions of a regular magistrate, whose learning and professional habits were calculated to give intelligence and facility to the dispatch of business.

The advantages to be derived in the investigation and decision of a cause, by the employment of a man of legal habits, whatever the law may be which he originally studied, are infinite. Every law is guided by a certain set of general principles, which may be applied with considerable facility to almost any other.

An advocate, indeed, cannot always state with advantage the merits of a foreign law, to a Judge hearing the cause in the first instance; but wherever the merits of the question are fully discussed by counsel for both parties before a foreign magistrate, if well versed in the great tactics of legal debate, he will seldom be at a loss to see on which side the right lies. The facility with which our judges in the Supreme Court acquire a knowledge of the Indian jurisprudence is remarkable.

Every change in the constitution of the courts has been attended with an alteration in the rules, by which they were to be guided in their hearing and trying of causes. A new set of regulations was published on the 5th of July, 1781. The

number of rules did not, however, amount to one hundred, and were contained in the moderate bulk of seventy-two quarto pages.

The object of the new code, as passed in 1781, is declared to be the explaining such rules, orders, and regulations, as may be ambiguous, and revoking such as may be repugnant or obsolete; &c. &c. &c.

Many of the rules then introduced form a part of the existing Bengal code.

The thirty-eighth rule seems liable to exception. It forbids a report of the facts of the cause being made by the Native Officers of the Court to the European Judge. A rule similar to this seems to have been understood as existing in the Provincial Councils. Where the Vakeels of the parties attend at the examination, and each is at liberty to examine his own, and cross question the witnesses of the other, it is hardly necessary for the Judges to be present. The conclusion to be drawn from the facts should no doubt be made by the Judge. Nor can it be denied, that his personal observation upon the demeanor of a witness whilst under examination, is often of advantage in estimating the weight which ought to be given to the testimony. But the interruption which this tedious and irksome attendance must give to his other judicial duties is obvious. The ablest magistrates not unfrequently require

time to pause and deliberate on the judgment which they are to pass; but where shall leisure be found for this by the magistrate who is all day employed in listening to the tedious detail of a black man's story?

This difficulty has been felt in the after progress of the system; and power, accordingly, has since been given, to refer the examination of witnesses to the European Registers.*

It is provided by the seventy-ninth rule, that the Court of Sudder Dewannee Adawlut may receive new evidence on an appeal, or send back the cause to the inferior courts for that purpose. It is not undeserving of remark, that this rule formed one of the articles of impeachment against Sir Elijah Impey. If he, the judge, had established such a rule of his own act, without the authority of Government, the measure might have been open to censure. The reception of further evidence by the immediate act of the court of ultimate appeal, although not new to the practice of judicial proceedings in some countries, nor to our own ecclesiastical tribunals, is foreign to the usage of the English common law courts, and exceptionable perhaps on principle; yet being sanctioned by the legislative act of the Bengal Government possessing authority

* See Bengal Regulation 1803, regulation 49, sec. 6.—Ceded Provinces 1803, reg. 8, sec. 25.

competent to that end, it is difficult to see how it could have become a crime in a judge to accept of such powers. What it was legal to enact, it could not be criminal to execute.

Different objections occur against new evidence being receivable by the superior court. The inconveniency to witnesses in attending at a court distant (as courts of appeal in general are) from the province in which the suit was originally tried, is great; but above all, the check intended by a gradation of courts would be defeated, by it thus being in the power of the dernier court to destroy the effect of the evidence. In England, accordingly, the further examination of evidence is always remitted by the House of Lords to the court below. Powers are now given to the Sudder Dewannee Adawlut to direct further evidence to be received by the court below. (Bengal Regulations 1798, Reg. 9, Sec. 7.)*

At this period the superintendence of criminal justice appears to have been vested in the Gover-

* Another singular charge against Sir Elijah Impey is founded on his having, in summing up the evidence of the Patna cause, adverted to the small salaries annexed to the offices of Cauzee and Muftee, and raised an inference from that of the probability of their corruption. "The said principle, the charge says, is false, scandalous, and immoral, and highly disgraceful in the lips of a British Judge." But upon what other principle, it occurs to ask, are such liberal salaries granted to the English Judges?

nor General. A separate department was established at the Presidency, to which were to be transmitted monthly reports of proceedings, and lists of prisoners apprehended and convicted by the respective authorities throughout the Provinces. To arrange these records, and to maintain a check on all persons entrusted with the administration of criminal justice, an Officer was appointed to act under the Governor General, with the title of Remembrancer of the Criminal Courts.

But the ultimate decision remained vested in the Naib Nazim, who held his court at Moorshedabad. Criminal cases of an inferior nature were taken cognizance of by the Collector.

A careful inspection of the orders and rules passed for the Moffusil Courts and Sudder Dewannee Adawlut, in July, 1781, and which are said to have been drawn up by Sir Elijah Impey, lead us to believe that these are, in a great measure, the germ from which the prolixity of the process has sprung. The rules are dictated in technical language, expressed with redundant superfluity of words, and needlessly multiplied.

In point of perspicuity, this code is much inferior to the original one of 1772. The following is the order of exhibiting a cause in the court; which is deserving of more particular attention, as the same rules still prevail. 1st. The

Complaint;—2nd. The Answer;—3rd. The Reply;—4th. The Rejoinder. The parties may thus interchange their pleadings four times; but as supplements to each are allowed, they may be brought, in fact, to exchange them eight times, before the judge proceeds to the hearing of the witnesses. This may be a very proper scheme of things in an advanced state of society, where advocates of education and attornies of long practice are to be found, where legal sages preside, and where the whole cause is regulated by the dictates of artificial reason, and with all the machinery of law; but it seems deficient in that simplicity which is suited to the habits and manners of the people of India.

If these pleas are all put in, the delay is great; and we know that the interest of the pleaders, or Vakeels, from the fees which they receive, will naturally lead them to multiply distinctions and prolong the process.

In regard to the number of these pleas, which are allowed as of right, it may be proper to remark, that a variety of cases may arise, in which it would be unjust for a judge to refuse them. They may, in many instances, be essential to the justice of the case, and accordingly such as a judge, following the dictates of natural reason, and unshackled by any prescribed forms, would allow; but how many cases must arise, where

the occasion for them is unnecessary? These pleas are, in fact, borrowed from the practice of the law courts in England.

Special pleading in the English law has been brought to such refinement and precision, that the allowance of these pleas can never create confusion. But what must be the endless confusion from such pleas being hastily advanced, loosely answered, and needlessly multiplied, by black pleaders? An attempt is, indeed, made in the regulations, to describe the principle on which the pleas are to be admitted; but few Europeans, however well educated, if not instructed by legal tuition and practice, could, from those rules, draw out the reply or rejoinder with such precision, as not to hazard either needless prolixity or dangerous conciseness.

But it is needless to enlarge upon the necessity of revising this article in the Indian code, which must be regarded as one of the most fertile and abundant sources of that prolixity in the process, which has been so often complained of.*

* The substantial rules of pleading, Lord Mansfield observed, "are founded in strong sense, and in the soundest and closest logic, and so appear when well understood and explained, though by being misunderstood and misapplied they are often made the instruments of chicane." (*Robinson*, v. *Rayley*, 1 *Bur.* 316.) See further, Chap. xii. on the subject of the Process of the Courts.

CHAPTER V.

Fifth Period.—Abolition of the appointment of Sir Elijah Impey, in November, 1782, and the Re-assumption of their Jurisdiction over the Court of Sudder Dewannee Adawlut by the Governor General and Council.

IN consequence of a resolution to that effect by the Court of Directors, the superintendence of the Sudder Dewannee Adawlut was resumed by the Governor General and Council, and it was declared that, agreeably to the 21st Geo. III. this court was constituted a Court of Record, and its judgments to be final, except in appeal to the King in civil suits only, the value of which should be five thousand pounds and upwards.

The progress of the judicial system during the four following years cannot now be traced. It does not appear that any great alterations took place, no notice of any such being to be found in any of the India tracts which carry reference to that period.*

* A reporter was attached to the Court.

CHAPTER VI.

Sixth Period.—Arrival of Lord Cornwallis in India, in 1786.

INSTRUCTIONS appear to have been sent by the Court of Directors, in the General Letter addressed to the Governor General in Council, of the 12th of April, 1786, for regulating the administration of justice on principles accommodated to the subsisting manners and usages of the people, rather than by any abstract theories drawn from other countries, or applicable to a different state of things.

They directed that the Courts of Dewannee Adawlut should be placed under the management of the Collector of the Revenue. The Collectors also executed the duty of Magistrates, in apprehending offenders and delivering them over to the Mahometan tribunals. Government were prohibited from interfering with the latter courts, further than in softening, or endeavouring to soften, by their influence, the too great severity of the Mussulman code.

On the 27th of June, 1787, a body of judicial regulations were passed, but they did not greatly differ from those enacted in 1781.

In the cities of Moorshedabad, Dacca, and Patna, distinct courts were established, superintended by a Judge and Magistrate, the office of Collector not being in these situations necessary. Appeals were allowed, within certain limits, to the Governor General and Council, in their capacity of Judges of the Sudder Dewannee Adawlut; and from the decisions of the Collectors appeals were allowed; first, to the Board of Revenue, and thence to the Government.

CHAPTER VII.

Seventh Period.—Alterations in the Criminal Court in 1790, 1791, *and* 1792, *by the Governor General assuming the Administration of Criminal Law, and the introduction of Courts of Circuit.*

AT the end of the year 1790, the Governor General accepted the administration of Criminal Justice throughout the Provinces.*

The Nizamut Adawlut was removed from Moorshedabad to Calcutta, and vested in the Governor General and Council, assisted by the Cauzy ul Cauzant and two Mollahs.

Courts of Circuit, superintended each by two Covenanted Servants, and an establishment of Law Officers, were appointed in each of the great Provinces.

The regulations for the administration of criminal and civil justice were revised and amended; but they present nothing of importance sufficient to detain the attention, and we hasten to the great period of change in 1793.

* "Accepted."—This term we find generally used in reference to the occasion, as the arrangement was made, perhaps, to proceed from a tender of the office by the Nabob to the Company.

CHAPTER VIII.

Eighth Period.—The Establishment of the great Code of General Regulation, in 1793.

WE are now arrived at the period of the great change, when all the former rules appear to have been revised, amended, and formed into one more enlarged and established system. The leading principle of Marquis Cornwallis's government appears to have been that of forming, in every branch of the India establishment, a system. By this term may be implied a body of rules, formed in reference to experience and general principles, prescribed in written forms, superintended by separate departments of office, and calculated to advance the happiness of the people whilst they add to the interest of the governing power. It is an arrangement of this sort, which distinguishes a regular from a despotic government: it has, accordingly, been the great object of every wise ruler to establish a regular subordination of offices, to form a body of fixed laws for the guidance of these, and to endeavour to give permanency and stability to his institutions. But a work of this kind is almost too great for the mind of any single man

to conceive. It is certainly too extensive for the period of any one life to carry into effect; and accordingly, every attempt in this way has uniformly failed, although some have been attended with more success than others. Lord Cornwallis left no branch of the political, financial, mercantile, judicial, or military departments unaltered. He endeavoured to improve each; and, on the whole, each department is considerably indebted to the energy and prudence of his excellent understanding.

In the Judicial Department a regular series of courts was established. To begin with the lowest: a court of Native Commissioners, who held cognizance of small causes not exceeding fifty rupees, was established in every district; to every Zillah, or District, a single Judge or Magistrate was allotted, having cognizance of all civil suits in the first instance.

The decision of neither of these courts was final. Courts of Appeal in four different Provinces were established, each consisting of three Judges, with appellate jurisdiction from the decision of the Zillah Judge. The decision of the Provincial Court became final in real property not exceeding one hundred rupees of annual produce, and extended in personal property to the sum of one thousand rupees.

A Supreme Court, styled the Sudder Dewannee Adawlut, was established at the Presidency,

consisting of the Govenor and Council. It was to receive appeals from the Provincial Courts, and its judgment became final in all suits whatever.

The distribution of criminal justice was as follows:—The Zillah Judge, acting as a Magistrate, took cognizance of petty offences, and secured persons accused of capital crimes for trial before the Provincial Court. Two of the Judges of that court were made to go the criminal circuit of the Province: they tried and adjudged criminals by the Mahometan law, and ultimately remitted their judgment to the superior court of Nizamut Adawlut, which was held at the Presidency, and consisted of the Governor and Council. The subjects of criminal and civil justice are described by separate regulations. The present inquiry is confined to the latter.

But the most beneficial improvement introduced by Marquis Cornwallis consisted in the following principles:—

First.—Declaring the property in the soil to be vested in the land-holders.

Secondly.—Declaring the revenue payable to Government from each estate as fixed for ever. These measures have at once rendered it the interest of the proprietors to improve their estates, and given them the means of raising the funds necessary for that purpose. The property

in the soil was never before formally declared to be vested in the land-holders, nor were they allowed to transfer such rights as they did possess, or raise money upon the credit of their tenures, without the previous sanction of Government. With respect to the public demand upon each esate, it was formerly liable to annual or frequent variation, at the discretion of Government.

Thirdly.—The separation of the revenue and judicial duties.

Previous to the administration of Marquis Cornwallis, the administration of justice and the collection of the revenue was vested in the same person. Exclusive of the objections arising to these courts from their irregular, summary, and often *ex-parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfered with their financial duties, it was obvious that, if the regulations for assessing and collecting the public revenue were infringed, the revenue officers themselves must be the aggressors, and that individuals who had been wronged by them in one capacity, could never hope to obtain redress from them in another.

The office of Judge and Collector was therefore separated, and their duties prescribed with accuracy and precision.

CHAPTER IX.

Of the Regulations for the Administration of Civil Justice, as passed in the Year 1793.

THE Regulations passed in the year 1793, amount in number to fifty-one; and form, with the Appendix, a moderate folio volume. The object of the Code is well described in the forty-first Regulation of the code, which ought, indeed, to have formed the leading one.

" It is essential to the future prosperity of the " British territories in Bengal, that all regula- " tions which may be passed by Government, " affecting in any respect the rights, persons, or " property of their subjects, should be formed " into a regular code, and printed with transla- " tions in the country languages; that the grounds " on which each regulation may be enacted " should be prefixed to it; and that the courts " of justice should be bound to regulate their " decisions by the rules and ordinances which " those regulations may contain. A code of re- " gulations, framed upon the above principles,

" will enable individuals to render themselves " acquainted with the laws, upon which the " security of the many inestimable privileges " and immunities granted to them by the British " Government depends, and the mode of obtain- " ing speedy redress against every infringement " of them; the courts of justice will be able to " apply the regulations according to their true " intent and import; future administrations will " have the means of judging how far regulations " have been productive of the desired effect, and, " when necessary, to modify or alter them as " from experience may be found advisable. New " regulations will not be made, nor those which " may exist be repealed, without due delibera- " tion, and the causes of the future decline or " prosperity of these provinces will always be " traceable in the code to their source. The " Governor General in Council has accordingly " enacted as follows:—

" Every rule or order that may be passed by " the Governor General in Council, regarding " the administration of justice, the imposition or " levying of taxes or of duties on commerce, the " collection of the public revenue assessed upon " the lands, the rights and tenures of the pro- " prietors and cultivators of the soil, the pro- " vision of the Company's investment, the manu- " facture of salt or opium, and generally all re- " gulations affecting in any respect the rights,

" persons, or property of the natives, or any in-
" dividuals who may be amenable to the Provin-
" cial Courts of Judicature, shall be recorded in
" the Judicial Department, and there framed
" into a regulation, and printed and published
" as hereafter directed.

" The Civil and Criminal Courts of Justice
" are to be guided in their proceedings and deci-
" sions by the Regulations which may be
" framed and transmitted to them as above di-
" rected, and by no other."

Having thus stated the system, we may be allowed to pause and contemplate its general aspect. In the separating of offices and the division of duties, in the gradation of courts and the body of laws prescribed and fixed for the guidance of these, we find all the machinery of a regular system; but we do not find that artists have been prepared to guide the work. Laws have been instituted before Lawyers were formed to interpret and administer them. The growth of the one part of the subject has been too rapid for the other. Laws are nothing without the habits suited to these. The excellence of such a plan, in the abstract, can never be called in question by the cultivated European mind: the question of more difficult solution is, as to its fitness for an Indian state of society. Laws should be formed, we are told, in reference to manners, and not the latter forced to bend to the

former. The manners of a people are the growth of the climate, of religion, of circumstances, and of time. These combinations unite, in a singular degree, to give a marked and indefaceable character to the manners of India. But the laws, it is said, are preserved; the manner of executing these is only changed.

All change in legislation is an experiment, and time, the great legislator, can only determine the excellence of the present system.

Were a stranger, a native of some foreign land, to take up the original code of 1793, he would be forcibly struck with the solicitude with which it provides for the protection of the native, the general spirit of equity which it breathes, and the clear and dignified language in which it is conceived. He would pronounce these to be the laws of a great nation, who, free in their own country, were alone worthy to rule in that of others. And such, in point of fact, we know to be the sentiments of intelligent foreigners, in respect to our interior Government of India. But amongst all our institutions, there is none with which they are said to be so forcibly struck, as with that regulation which excludes European born subjects from becoming the proprietors, by purchase, of large estates or tracts of land, or from renting any such in the interior, or out of the limits of Calcutta. Europeans in the service of the Company are further prohibited from being

engaged in loans of money to the native renter or farmer of land. Engagements of this sort might be productive of the most pernicious consequences to the natives, by the overpowering influence of European wealth in the market; whilst it would lead, at the same time, to a variety of abuses in its different operations on the Indian habits and character. But these restrictions do not exclude the erection of dwelling-houses, or buildings for the purpose of manufactures or other commercial concerns.*

It is proper here to explain a point not very generally understood in England. No new body of laws has been created for the people of India: certain rules have only been given for the administration of their own laws. This is a distinction which ought to be always borne in mind. In the criminal law some alterations have been made, in order to soften the severity of the Mahometan Code; and some laws established as to property, immediately derived from the English Government, such as the fixed assessments and the right in the soil, which last had either never existed generally in India, or, with some exceptions, had been long lost under the Mahometan Government.

The great body of the judicial code consists of rules for the more speedy hearing and determining suits in the courts.

* Regulation 38, 1793.

The above may be given as the general outline of the system established in 1793. If its progress is to be traced in the code itself, several folio volumes must be perused before an analysis can be given. Every year has produced new regulations: every regulation has led to other regulations; and changes upon changes have been multiplied, and are now multiplying, without apparent end. An examination of every separate regulation, with the various modifications which it has undergone, would be an Herculean labour, and would extend this review to too great a length; it is proposed, therefore, to confine the present remarks to some of the most important articles in the code, and to limit the whole to the year 1805. The material alterations that have subsequently taken place will however be briefly noticed, down to the year 1812.

CHAPTER X.

On the subject of Appeals.

OF the frequent occasions that arise for appeals in every system of jurisprudence, and of the advantages which are to be derived from these, no one can be ignorant, inasmuch as they are calculated to give relief against erroneous decisions; although it does sometimes happen that a wrong sentence is substituted on the appeal for a right one. As it does not follow that the last opinion is therefore the best, under what circumstances an appeal shall be granted or denied, and how often it may be repeated, is perhaps one of the most difficult questions in legislation. To admit of no reference to a higher authority, is calculated to render judges negligent and arbitrary, whilst it opens a door for partiality and corruption: on the other hand, a right to prosecute a petty cause through several tribunals, puts it in the power of a litigious suitor to harass his adversary with exorbitant expenses and delay. A remedy against this abuse has sometimes been adopted, by rendering

the decision final upon the concurrence of two or more tribunals in the same judgment. By the Theodosian Code, the concurrence of two courts in a similar decree barred the right to appeal. Justinian enlarged the rule to three; and in many states on the Continent this last principle still prevails. In every country, the right to appeal is, in a great measure, regulated by the importance of the subject or its estimated value in money. Importance, it is true, is often a relative term; and what is a light matter to one man, is perhaps of magnitude to another: yet the law must regulate its process by fixed rules, and money, which is the common measure of every thing, has been here also made the standard.

Different circumstances conspire to render the first sentence passed in a cause the most liable to error. The prejudices which every judge is apt to receive on the original hearing, from the opposition to his opinion by the advocates, in contending for the admissibility or rejection of evidence, has a tendency to mislead the judgment more in this than in any after stage of the proceedings. On the appeal, where the whole evidence is in writing, there is less matter for contention. The opinion of the judge is not called for as to any intermediate points; he is merely required to weigh the arguments on what has already passed: and arguments, we know, seldom excite much warmth, unless where they

come to be given in immediate opposition to our own opinion.

The judgment on an appeal will therefore be generally found more correct than in the original sentence; and causes being commonly tried, in the first instance, at the place where the parties live, the judge, if resident on the spot, is of course liable to certain feelings and prepossessions, which few men can entirely resist. The appeal is understood to be made not only to a court of greater power, but also to one more eminent for the learning and number of its judges.

To appeal is a natural right, and is always understood to be admitted, unless barred by a positive law. In a regular state of society, and at an advanced period of civilization, no bar ought, perhaps, to be placed on the exercise of this right. Where every cause is open to appeal, and justice is impartially administered, the interest of the parties will, in general, tell them where to stop. No restriction, we believe, is placed by law on appeals, or what amounts to the same, on writs of error from the Court of King's Bench in England. We find, however, that in the course of three years, only twenty of these appear to have been finally prosecuted from all the different courts in England.*

* Report of the Select Committee of the House of Commons, 1798, on the Courts of Justice.

Two things chiefly give rise to appeals: a fluctuation in the sentences of courts; and an advantage arising to the party from a delay in executing the sentence.* Both these causes conspire to give rise to appeals in Bengal.

On the new establishment of the courts, the decisions were not always guided by fixed principles in the mind of the judges; and, accordingly, a considerable variation is said to have prevailed betwixt the opinions of the different courts giving judgment in similar cases, and even betwixt the opinions of the same judges at different periods.

The advantages to be derived from delay, on the other hand, are obvious. The courts adjudge only the legal interest of twelve per cent.; but the employment of capital, in most places in Bengal, is calculated to afford an advantage of perhaps four or five per cent. per month.

By the Adawlut regulations three appeals are demandable, of right, on all causes of importance, at least beyond five thousand pounds: this is two more than what is granted to a British subject living under the jurisdiction of the Su-

* Causes, however, are seldom so exactly alike, in points of facts and law, as is generally imagined. The want of attention to this circumstance, often leads to prejudices, on the part of the public; and causes are sometimes supposed to have been erroneously decided, when, in truth, the court have proceeded on distinctions which escape the general eye.

preme Court. And special appeals may be granted in all cases, at the discretion of the Sudder Dewannee Adawlut.*

The principle of all eastern governments has been unfavourable to appeals; but in eastern governments justice has been always defectively administered. An appeal is very rare from the Supreme Court to the King and Council. During a period of more than seven years, only two appeals are said to have been made. Will it therefore be said, that the right to appeal from that court is unnecessary? Certainly not. The privilege itself prevents the necessity of its frequent use. No better instance can be adduced of the justice of any court, than that of the suitors seldom appealing from its judgment. The decision of causes is liable to uncertainty, from the undefined state of the law, from a want of intelligence in the judges, and from causes being pleaded, or stated, with more precision and ability by one advocate than by another. The removal and succession of judges is another great cause of uncertainty. Most judges have particular notions of their own, as to evidence and process, and particular systems of equity, to which they are partial.†

* Fifth Report, page 85.

† Two men committed a larceny in a poultry yard. One fled; the other was taken, and tried before Lord Loughborough, who sentenced him to a few months' imprisonment. His com-

If it were possible to ascertain the precision or otherwise, with which justice is administered by the Judges in the Courts of Adawlut, some idea might be formed of the limits which ought to be put to appeals.

An opportunity has occurred of perusing a report of civil cases adjudged by the Court of Sudder Dewannee Adawlut in the year 1805, revised and selected for publication by the Judges of the court.

It exhibits eighteen different cases. Of the decisions of the Provincial Court, nine appeared confirmed, six reversed, and three amended by the superior Court. Of the decisions by the Zillah Court, seven had been reversed, eight confirmed, and three amended by the Provincial Court. No appeal is made from the Sudder Court, on any of these occasions, to the King and Council. Some of these causes had been depending for a period of twelve years; the shortest period being that of three years.

These reports display the intricacy and refined distinctions that prevail in the Hindoo and Mahometan law. Under such a system, justice can

rade, who had absconded, returned on hearing the result, expecting a similar punishment. He was tried before Judge Gould, who had adopted an opinion, that the man who began to steal poultry always concluded his career by committing some atrocious crime. Under this impression, he sentenced the astonished offender to transportation.

never be correctly administered, but through the medium of men cultivating jurisprudence as a science, and forming their decisions in reference to received principles; and accordingly in India, legal sages, under the character of Pundits and Muftees, have always cultivated the study of jurisprudence, agreeably to the institutions of their respective religious and civil code.*

Assuming the reports of the above year as a sort of general standard, it affords the presumption, that half the number of appeals to the superior Court are reversed or amended. Yet still it remains to be ascertained, how many cases have been submitted to in the Zillah Court without appeal, and how many of the decisions of the Provincial Court have also been approved by the parties. If the number of causes brought before the Sudder Court for the year 1805 did not exceed eighteen, the business of the court, in that way, was sufficiently limited: but from the expression, "selected for publication," it would seem that this collection does not include all the cases which had been brought before the court during the year.

The number of cases reversed or amended, in this publication, would seem to indicate, that the right to appeal is not too generally granted.

* No evidence however exists, that courts of justice were ever established in the Hindoo governments.

This, however, proceeds on the supposition, which we have no reason to question, that the decisions of the superior court were more correct than those of the inferior courts. If the arguments of the judges in the different courts had been distinctly detailed, some conclusion as to their proficiency might have been formed;* but when the record merely expresses, that the decree was passed in reference to the fact not being established, without stating the further grounds, no conclusion, as to the justice, or otherwise, of the decree can be formed.† The

* It is to be regretted, that the form of drawing up these reports did not admit of the reasons being set forth, on which the Provincial Courts had formed their judgment. These courts were, in general, superintended by very able experienced servants. It would have been satisfactory to have known how they held in some of these cases; and how far the opinion of their native law officers corresponds with those of the superior court.

† The following remark is subjoined to the thirteenth cause: "The custom of entrusting agents with signed blanks being very prevalent, the decision in this case is important. It was adjudged, that the principal is not bound by an engagement which his agent has inserted in the blank, without authority or against instructions. Such was the decision of the two superior courts; but the Zillah Judge held otherwise, and conceived, that as the defendant had given the signed blank to her agent to raise money on, she was answerable for whatever was inserted in it. Ex qua personæ quis lucrum capit ejus factum prsætare debet." Reg. Jur. 149.

references which are made to the opinion of the Native Law Officers, bear most satisfactory testimony to the candour and integrity of the Judges. Indeed the Report must be considered as a most valuable addition to the stock of Indian jurisprudence; yet still a reversion of half the cases appealed must evince that justice is not yet formed into a system, and that uncertainty prevails in the decrees of the courts.

A separate printed report of select cases adjudged in the Sudder Dewannee Adawlut, previous to 1805, exhibits a detail of forty-one cases. Some of these appear not to have come through the Provincial Courts, having been decided before their institution. Of decrees passed by the Zillah Judge, nineteen are confirmed by the Provincial Court, eleven reversed, and two amended. Of decrees passed by the Provincial Court, eighteen are confirmed, fourteen are reversed, and nine are altered or amended. These reports extend from 1791 to 1804, but they do not certainly contain all the cases decided in the Sudder Court during that period.

Since the era of publishing the regulations in 1793, some alterations have taken place in respect to appeals.

Originally, the decision of the Sudder Dewannee Adawlut was final in all suits whatever; but in 1797 the right to appeal to the King and Coun-

cil was instituted, under the 21st Geo. III. in civil suits, the value of which should be five thousand pounds and upwards.

An appeal now lies to the Provincial Courts of Appeal in Bengal, Bahar, Orissa, and Benares, in all causes whatever that may be tried by the Judges of the City and Zillah Courts, in the first instance; but the decrees of the latter, on appeals from the Native Commissioners, are final; and likewise from their Registers, except for real property, where the decision of the latter is reversed, in which case an appeal lies to the Provincial Court of Appeal. But the latter court is allowed a discretion to admit an appeal in any case, wherein it may see special reasons for so doing.*

The cognizance of the Register carries reference to two hundred rupees, and to its corresponding value in real property. The final decision of the Provincial Court was extended in 1797 to five thousand rupees, in suits for money or personal property; and in 1798, the decision became final in suits for real property of the above amount. But the Sudder Adawlut may receive an appeal from such decisions, under special circumstances. Thus it would appear, that any cause may be made the subject of an appeal in Bengal.

* Fifth Report of the House of Commons, 1812, page 85.

The following rule is remarkable:—"The "amount adjudged against the party desiring to "appeal, or the amount of his claim, disallowed "by the decree from which he may desire to "appeal, being the standard for determining his "right to appeal."*

This rule is certainly repugnant to the principles of jurisprudence. In England, and perhaps in every other country in Europe, the amount of the sum demanded, and not the amount allowed by the judge, determines the right to appeal.† The regulation places it in the power of a judge, by limiting his sentence to a certain sum, to admit or reject an appeal at pleasure.

Various difficulties are thrown in the way of hasty appeals. The appellant is to give security for costs, and for the performance of the final decree, including the fees of the pleader.

"No appeal shall be received by Provincial "Courts of Appeal, or by the Sudder Dewannee "Adawlut, without payment of a fee of one anna "per rupee, as far as two hundred rupees; "four per cent. as far as one thousand rupees; "three per cent. as far as five thousand rupees; "two per cent. as far as twenty-five thousand "rupees; one per cent. as far as fifty thousand "rupees; and a half per cent. on sums above

* Regulation 12, 1797, sec. 2.

† Vulteius de Judiciis, lib. 4, c. 2, sec. 74.

" fifty thousand rupees, in lieu of the fee fixed " by Regulation 38, of 1795."—Beng. Ben. 1797, reg. 6, sec. 7. — Ced. Prov. 1803, reg. 43, sec. 7.

" Except from Paupers."—Beng. Ben. 1797, reg. 6, sec. 9. — Ced. Prov. 1803, reg. 43, sec. 9.

" Nor unless written on a stamped paper of " four annas in causes of one hundred rupees; " eight annas in causes of two hundred rupees; " one rupee in causes not applicable to Sudder " Dewannee Adawlut; two rupees in causes so " applicable."—Beng. Ben. 1797, reg. 6, sec. 17, c. 1 to 5.—Ced. Prov. 1803, reg. 43, sec. 13, c. 1 to 5.

" If an unstamped plaint shall be filed, the " party shall lose the benefit of it, till payment of " a penalty of ten times the stamp-duty."—Beng. Ben. 1797, reg. 6, sec. 17, c. 11.—Ced. Prov. 1803, reg. 43, sec. 13. c. 9.

" But the paper may be supplied gratis to " paupers."—Beng. Ben. 1797, reg. 6, sec. 19. —Ced. Prov. 1803, reg. 43, sec. 6. c. 1.

" The presentation of the petition, within the " prescribed period, unless the fee be also paid " within the same period, shall not preserve the " right of appealing."—Beng. Ben. 1797, reg. 6, sec. 6, c. 2.—Ced. Prov. 1803, reg. 43, sec. 6, c. 2.

Under these restrictions nothing, certainly, but a strong sense of the justice of his cause, or some obvious advantage from delay, could induce any suitor to appeal from the original or second sentence. A fine is also exigible in vexatious suits.

The following rule, which applies to appeals from the Zillah to the Provincial Court, and from the latter to the Sudder Dewannee Adawlut seems objectionable:—

"The petition shall be presented to the Court "in which the decree appealed against shall "have been passed, within three calendar months "after the day on which the decree may have "been given." The latitude here allowed appears much too large. By the Roman law, the appeal is required to be made within ten days from the date of the sentence. Pothier has remarked on this rule in the following words. "These principles of the Roman Law, although "very opposite to our own, appear very wise, "and well calculated to promote the tranquillity "of society, by shortening litigation. The King "of Prussia has adopted them in his code, and "allows only ten days for appeal, agreeable to "the provision of the Novel. The party injured "by the sentence suffers no prejudice from the "shortness of this delay: it was in his power, "from the commencement of the process before

" the first judge, to foresee that he might lose " his cause ; and he had time, during the whole " continuance of it, to deliberate upon the course " which he would take in that event."

The principle in England is, that a judgment shall only be reversed by a greater number of judges than what tried the original cause. Two judges, although in a superior court, cannot reverse the judgment of an inferior.

The Court of Sudder Dewannee Adawlut has, at different times, consisted of the Governor in Council; at other times three Judges, one being a Member of Council; and afterwards of three Judges, neither of whom were in Council. In 1807, the number of Judges was augmented to four, the chief being a Member of Council. Since that period, a regulation has been passed, in 1811, for augmenting the number of puisne judges according as from time to time may appear necessary for the dispatch of business.*

According to Lord Chief Justice Hale, the ultimate appeal in every country is to the Government of that country. Our last appeal in England, for causes arising within the realm, is to the House of Lords;† but no government can, properly, pronounce on appeals, unless through the medium of their law officers. Their

* Fifth Report, page 89.

† Appeals from the Colonies and India Establishments are to the King and Council.

frequency would prevent the possibility of Government ever acting in that capacity in Bengal.

By the late constitution of the Sudder Dewannee Adawlut, it is made to consist of four Judges. This arrangement has been only instituted to forward the decisions, as two of the Judges form a court on each appeal.* During the period of 1805, the court appears to have consisted of three Judges; yet the whole number are only found sitting on one of the cases reported, No. 8.

It has been already observed, that half of the decisions appealed from the Provincial Courts, appear to have been reversed, or altered. We need go no further in search of a motive to appeal. The appeal proceeds (or ought only to proceed) upon the presumption of a wrong decision having been passed. If half the number of appeals from the superior courts in Britain were to be reversed in one year, an alarming uncertainty would prevail. Hardly any man cast in the first court would think that he had received justice: every one would be ready to appeal.†

* "The Court of Sudder Dewannee Adawlut and Nizamut "Adawlut shall in future consist of a Chief Judge, and of as "many puisne judges as the governor general in council may, "from time to time, deem necessary for the dispatch of the "business of these courts." Reg. 12, 1811.

† During the period of three years, 1787, 1788, and 1789, only seven writs of error were brought before Parliament. Of

The too general right to appeal is productive of many evils; it encourages litigation, produces expence, occasions great delay, and has a natural tendency to shake the confidence of the Natives in the justice of the system. During the many years that an appeal is pending, various changes frequently take place. The parties have demised, or have removed to different parts of the country; their sureties have disappeared; new heirs have succeeded, ignorant of their rights, or not perhaps prepared to pursue them. The law itself, or regulation, under which the

these the judgment in five of the cases were affirmed, in one reversed, and in one amended: during the same period, thirty-three appeals were brought up from Scotland; of which twenty-four were affirmed, three reversed, and four remitted back for further evidence, one fell by default, and one was withdrawn. Of the number of cases in error in the King's Bench or Court of Exchequer during that period, no means is immediately at hand for ascertaining. But the ultimate appeal is in the House of Lords, as to causes arising within the Realm, appeals from the Colonies and East Indies being brought before the King in Council.

The number of appeals and writs of error before the House of Lords, in March 1811, appears to have amounted to no less than two hundred and seventy-three; from the Courts of King's Bench, Exchequer, and Exchequer Chamber, in England, thirty-five; from the Courts of Chancery in England and Ireland, forty-three; and from Scotland, including two from the Court of Exchequer, one hundred and ninety-five; making a total of two hundred and seventy-three. (*See Cobbett's Parliamentary Debates, vol.* 19, *page* 233.)

original suit was instituted, has undergone new modifications: the property in the mean time is locked up, and being regarded as a *chose en action*, cannot be made the subject of commercial transfer by the parties.*

It may be further observed, that litigation creates irritation and disunion amongst the people. Hostile interests produce hostile feelings; and these, again, give rise to fresh disputes.

By rendering the judgment of the inferior courts final, as to a certain sum, the above evils would be remedied in part, if not entirely, and the administration of the law would be rendered more conformable to the habits and prejudices of the Natives. Some irregular decisions might perhaps, at first, be passed; but the natural progress of things would lead to a speedy correction of the evil. In every country a gradual change is to be observed in the judgments of its courts. This is to be ascribed to that improvement in thinking and learning, which experience and observation never fail to produce. "The cases of modern experience (according to "Lord Bacon) are fled from those that were "anciently adjudged."

Wherever an appeal is demandable, the whole process must be recorded in writing, or the wit-

* See Ben. Reg. 1798, reg. 5, sec. 5.—Ced. Prov. 1803, reg. 4, sec. 14.

nesses and advocates must be heard afresh in the superior court. Either of these methods leads to great delay; but where the judgment is conclusive in the first court, it may be sufficient for the judge to take only notes of the evidence as the witnesses are under examination.

But this method, like every other, is liable to some objections. The utmost which human prudence can do in the establishment of laws, is to avail itself of the knowledge and experience of former times, follow the successful result, and avoid that which has failed.

Connected with the subject of appeals, the right of revision comes next to be considered. In cases where no appeal is admissible, the party considering himself aggrieved has a right to desire a revision of the judgment on the following pleas.* "From the discovery of new matter or "evidence, which was not within their knowledge, "or could not be adduced by them, at the time "when the decree was passed, or for other good "and sufficient reason." The judge may, at his discretion, refuse the petition; but if he feels disposed to grant it, the case is to be referred to the Sudder Dewannee Adawlut, who will admit or reject the petition, as they shall think proper.

* Ben. Reg. 1793, reg. 2, sec. 2.—Ced. Prov. 1803, reg. 2, sec. 22.

A rule of this sort seems liable to great abuse. Who shall say whether the new evidence was, or was not, within the knowledge of the party on the original trial? To determine this question, a new trial is necessary. The civil law has pronounced it a dangerous precedent to order the reversion of a final judgment, under pretence of new evidence being discovered.* It was only admitted in the three following cases :—First,—Where the decision had proceeded on the oath of the party, without any other proof :—Second,—Where the writings had been withheld by the machination of the opposite party :—Third,—When the case carried reference to the affairs of the public or the state. By the French Law, a revision is only admitted where it appears that the evidence had been kept back by the machination of the opposite party. A revision of a sentence, otherwise deemed final, on pretext of new evidence being discovered, is altogether unknown to the English jurisprudence.† But if in other countries the renovation of a decree is discountenanced, it ought most emphatically to be so in India, where the fabrication of evidence is so general and so easily effected. No period of time is limited by the regulations,

* Pothier's Law of Obligations, vol. 1, page 551.

† "Nor will a new trial be granted on the ground of evidence supposed to have been discovered after the trial." *Blackstone, vol. 3, page 387. Note by Mr. Christian.*

beyond which the decree cannot be shaken; but surely it is essential to the peace and comfort of society that there should be some fixed period to law-suits.

The original sentence is further reversable on other good and sufficient reason. These terms are very general, and may imply almost anything.

The admission of a regular appeal, in cases of this sort, appears much less exceptionable. The rules under which an appeal may be brought are known and fixed; but here, every thing is undefined. To allow a party to approach a judge for a second judgment, is not unfrequently productive of the following evils. The first judgment is carelessly given, because a second may be obtained; and the second is confirmed, because the first has been pronounced. But the party who has suffered by the first, which he sees has been hastily given, thinks that he must succeed better on a rehearing of his cause, and seldom rests satisfied until his second doom is declared.

CHAPTER XI.

Fees on Law Papers and Stamp Duties.

THE fees on the institution and trial of suits, and on petitions presented to the courts, were first instituted in 1795, by regulation thirty-eight, in order to deter individuals from instituting vexatious claims, or from refusing to satisfy just demands; but in 1797, by regulation six, new fees, of double the amount, were substituted in room of the former, for the purpose as well of discouraging litigation, as to add eventually to the public resources. By this last regulation, stamp duties were established on certain original deeds or papers, and all copies of deeds or papers which may be prepared and attested by the Cauzees or their officers, or the Muftees, and on all pleadings in the courts of civil judicature, and on all copies of papers furnished by the said courts, and the board, and the collectors of the revenue, and on all Rowannahs issued from the department of the customs, and on certain written obligations for the payment of money, and on

the Sunnuds of appointment granted to Cauzees and authorized pleaders in the courts of judicature, with a per-centage on the fees paid to the latter.

These fees having been found inadequate to supply the deficiency of the public revenue, occasioned by the abolition of the police tax, for which purpose the stamp duty was partly established, were afterwards increased, in 1800, by regulation seven. Since that period, they are said to have undergone a further increase.

It has been asserted, that justice should not be rendered too cheap. This is perfectly true: but justice is never cheap where it is long delayed. Delay always involves expence, and hazard of ultimate loss from the death or failure of the parties. It has already been observed, that in a regular state of society, and under a proper administration of the law, no check is necessary on litigation. Whenever such is required, it will always be found owing to something peculiar in the constitution of the state, (as in the case we have already noticed of the too low rate of legal interest in Bengal,) or to a faulty administration of the law.

The great objection to the tax on law papers arises from this:—The fine or check is placed on all process; on the first, as well as on the last. This arrangement seems objectionable. Appeals should be discouraged under certain circum-

stances: but why should a man be discouraged from asserting his right in the first instance? A more equitable arrangement would have spared the tax in the original suit, and only imposed it on papers exhibited in the appeal to the Provincial Court; or rather, perhaps, in the second appeal to the Sudder Court.

One of the motives assigned for the original establishment of the Adawlut Courts in 1793, was the little expence to which parties would be put in prosecuting their rights.* It is now some years since a former Chief Justice of Calcutta† declared, that the expence, including the different fees on the prosecution of suits, in the Adawlut Courts, was greater than in the Supreme Court. The expence has since increased. The Supreme Court will here afford a striking illustration, that the appeals are not owing to anything peculiar in the disposition of the people. Appeals, as already observed, are very rare from the last-mentioned court; and the same observation will apply to His Majesty's Supreme Court at Madras.‡ In Bombay they are said to be more

* And by the Act (21 Geo. III. Cap. 70, Sec. 23.) enabling the Governor General in Council to frame regulations for the Provincial Courts, it was made a proviso, that the same do not produce any new expence to the suitors in the said courts.

† Sir John Anstruther.

‡ At Madras the appeals are more frequent than in Calcutta. There have been, during fifteen years that Sir Thomas Strange presided at Madras, sixteen appeals. Out of these there have

numerous. This, perhaps, may be owing to the circumstance of that court being superintended by a single judge, in the person of the recorder, and therefore commanding less respect in the eyes of the natives, than a tribunal regulated by three magistrates.

Yet in none of these courts has it been thought necessary to impose any check on the freedom of justice. There is no institution fee, no fee on law papers, and no particular security required in instituting the suit.* It is generally allowed, that litigation is not more prevalent in any of these towns than in one of equal extent in England; yet the very worst description of Indian characters are to be found in the towns of Calcutta and Madras. The Sircars of the former, and the Dubashes of the latter, are notorious for profligacy and want of integrity. The Indian character is no where found so pure as in the interior: capitals are always the most corrupt.

been three reversals; the rest of the judgments and decrees appealed from have been affirmed, including two, with regard to which His Majesty in Council was pleased to make a small variation as to interest. During the period of five years that he sat as Chief Justice in Novia Scotia, there was no reversal of any judgment of the Supreme Court there. These facts are collected from a late publication by Sir Thomas Strange.

* On appeals to the King in Council, security to the amount of one thousand pounds is required, or security equal to the value of the property detained.

The proper object of a tax is not to prevent the legal exercise of a right, but merely to check its abuse. To apply to a court of justice in the first instance, is a natural right, and one of the most essential privileges of society; every facility, therefore, ought to be given to its exercise. But to answer in a court of justice, in defence of one's actual possessions, is a right still more favourable. An appeal stands upon a different footing. The law has already declared against the right of the party cast; and it is proper that men should be taught to respect the magistrate, and to hesitate, before they reject his judgment. Here it may be fit to load the appellant with difficulties, in the way of expence, by a tax on law papers.

The great objection, however, to any restraint of this sort, arises from the tax falling so often on him who can least afford to sustain it—the poor man. But property is as valuable to the poor as to the rich, and indeed more so. In point of fact, there is reason to believe that a tax on law papers never prevents, in any country, an appeal, to the man convinced of his right; unless he really has not wherewithal to pay for the suit. Indeed, it is impossible that it ever should, if the suitor has confidence in the justice of the Supreme Court, and the suit is worth the expence of contesting.

Thus the tax interrupts the process of the

poor, and may become an instrument of oppression in the hand of the rich suitor. If Zyed prosecutes Omer, and if the former is defeated on the first trial, yet if Omer cannot pay the fee for the appeal, he loses his property; for a new institution fee is exigible on the appeal. Paupers are indeed exempted, if they are distinctly proved to be so.

Stamp duties are vexatious to all descriptions of persons, but chiefly to the poorer class, who cannot read, and who therefore find great difficulty in knowing what is the proper stamp required, and are accordingly always falling into embarrassment from mistakes in this way. They operate to the delay of business; and often, from casual mistakes, involve ignorant families in ruin. They are, besides, foreign to the manners of the country. The advantage to be derived to government from a tax of this sort, cannot be of any great moment, and had better be laid on almost any other article. It is no solution of the difficulty, to say that these fees come, in the end, to be paid by the party who is in the wrong, by being charged in the costs. By the Bengal Regulations, the party cast is to be condemned, invariably, in the costs of the suit, including every expence; unless the institution fee, which may, at the discretion of the Sudder Court, be proportioned.* But this is making a man pay

* Bengal Regulation, 1802, c. 5.

too dear for being in the wrong. How many cases are there, in which a man is perfectly justifiable in going to law?* The judges in England, accordingly, never award costs in a doubtful case; as where the party cast have probable cause for his suit: in cases of that nature each party pays his own costs. By the French law the party cast always pays the cost, whatever reasons, whatever counsel's opinion might have induced him to commence the suit. It is not considered with what intention, or to what end, the party began his process; it is sufficient that the opinion of the court is against him, and on this only he is adjudged to pay the cost.

But the inequity of the rule led to its own correction, by inducing the judges to avoid the enforcement.† Indeed, in point of practice, the judges in Bengal depart from the latter of the regulations, by directing the parties in particular cases to sustain each their own costs.

The peaceful possessor ought to be placed at the least possible expence in maintaining his rights. The law presumes in his favour; he has acquired his place under its authority; he is not bound to produce and prove his title, until the presumption is raised against him by the claimant. And it is, perhaps, on this principle, that

* Grotius de Jure Belli et Pacis, lib. 2, cap. 23, sec. 13, 3.

† See Domat's Civil Law, vol. 1, page 249.

by the laws of Holland the following rule is established.

The plaintiff, at his first preferring his suit, is to lodge a certain sum of money, by way of law tax, in the hands of the Clerk of the Court; but if the plaintiff gains the cause, the defendant that is cast is forced to repay him the money which was so lodged.*

The complaints against these stamps is increased, by the use of them being common to even the meanest trials before the Native Commissioners. In England the stamp regulations do not apply to cases brought before a justice of the peace.

How far a party has rashly or maliciously instituted a suit is a question of fact, to be determined by circumstances and the various relations of the case; the natural check, therefore, on litigation, is an increase of the costs or damages, at the discretion of the judge, in proportion to the vexatious or malicious nature of the suit. A law adjudging costs in every case alike defeats the equity of the rule; and, in fact, punishes a man for having lost his cause, rather than for having had a bad one.† A power is further granted to the judge to punish appeals which may appear to

* And a similar rule prevailed in the Bengal Regulations of 28th March, 1780, sec. 38.

† The institution fee may indeed be returned in all cases where the Sudder Dewannee Adawlut shall deem proper.

him litigious, by a fine to government, proportionate to the condition of the party and the circumstances of the case.* A fine of this nature requires some limitation: in most countries it is limited to quadruple costs.

It is a principle admitted by the modern writers on jurisprudence, that costs should never be exclusively paid by the party cast, unless where a litigious disposition is fully manifest.

How many instances occur, where the law is obscure and undefined, and where the case of the party has suffered, not from the want of right, or just title, but the failure of proof in the absence or death of his witnesses. Process extending to a period of eight or nine years must often be attended with the death of the witnesses and the failure of the proofs. In cases of this description, the law of most countries leaves it to the discretion of the judge to grant or withhold costs. Will it be said, that a party who has obtained the judgment of one court in his favour, but who has been cast on the appeal, has instituted his suit without probable cause? The opinion of respectable writers holds otherwise.†

Ben. Reg. 1802, 3, sec. 5. The courts may, on the institution of the appeal, direct the institution fee to be borne respectively by the parties. Ben. Reg. 1797, 6, sec. 8.

* Ben. Reg. 1795, 13, sec. 3.

† Voet, an eminent commentator on the civil law, (L. 42, T. 1, sec. 22.) Van Seevwen, in his Censura Forensis, subscribes to

The objection to a general tax on all legal obligations is great, in reference to the sale of land; for, from their general nature in Bengal, they apply to all objects alike.

"Taxes upon the sale of land fall altogether "upon the seller. He is almost always under "the necessity of selling, and must therefore take "such a price as he can get: the buyer is scarce- "ly ever under the necessity, and will, therefore, "only give such a price as he likes. He con- "siders what the land will cost him in tax and "price together. The more he is obliged to pay "in the way of tax, the less he will be disposed "to give in the way of price. Such taxes, "therefore, fall always upon a necessitous person, "and must therefore be frequently very cruel "and oppressive. Taxes on the sale of old "houses, of ground rents, &c., fall altogether on "the seller: those on bonds and contracts for "borrowed money altogether on the borrower. "All taxes upon the transference of property of "every kind, so far as they diminish the capital "value of that property, tend to diminish the "funds destined for the maintenance of produc- "tive labour. Those are all, more or less, un-

the above distinction. P. 2, L.1, C. 31, sec. 14. He even goes further, and holds that the possessor, when cast, ought not to be charged with the expences of the suit. As the right of possession lays the weight of the proof on the opposite party, unless the possession had been fraudulently obtained.

" thrifty taxes, that increase the revenue of the " sovereign, which seldom maintains any but " unproductive labourers, at the expence of the " capital of the people, which maintains none " but productive. Such taxes, even when they " are proportioned to the value of the property " transferred, are still unequal, the frequency of " transfers not being always equal in property of " equal value." (Wealth of Nations, B. 5, c. 2, p. 128.)

That these taxes have not hitherto tended to repress litigation, seems admitted. " Subsequent " reports are not calculated to show, that the " difficulty of keeping down the number of causes " depending on the file has at all diminished, or " that the means resorted to for that purpose " have been as successful as was expected."*

But if these taxes do not diminish litigation, they certainly add to its evils: they depreciate the value of the subject of the suit, they involve the parties in vast expence, and they irritate the minds of the natives against each other, and against the general administration of justice. It is by no means clear, that they have not a tendency, in some cases, to provoke litigation. Obstacles are in vain opposed to men determined to gratify their resentments, and pursue their interest at all hazards.

* Fifth Report of the Committee on India Affairs, page 169.

Where a point of honour, however mistaken, or the spirit of revenge, prompts an appeal to the law, the expences to be incurred only give edge to the contest, and urge the appellant to prosecute with more spirit and perseverance.

In almost every constitution of law, we find recognized the spirit which disposes men to gratify their revenge through the medium of the law. Hence the penalty by the Roman law against malicious law-suits; and hence the oath of calumny, which was enjoined the prosecutor, in most of the states of Europe, although now fallen into disuse from the frequent occasions which it gave to perjury.

CHAPTER XII.

On the Process of the Courts.

AS the subject may be contemplated under very different points of view, it may be proper to state the arguments in favour of a summary process, and also the reasons which seem to favour more regular proceedings.

In support of a summary form of process, it has been been, or may be argued as follows:—

It was the original principle of the system, that the laws of the Natives should be administered by Native Judges, and that the European Judge should merely act as a check upon the former. The principle, if duly observed, might meliorate the condition of the people; it could hardly operate to their disadvantage. But the process of the court is as much a part of the native law, as the decision which is to be passed in the cause. That the practice of the court is the law of the court, is a received maxim in the jurisprudence of every country. The means should be subservient to the end. We have reversed the rule: we have sacrificed the end to

the means; we have sacrificed the decision to the process. In order to maintain a regular and formal process, in conformity to the special pleading of the English Law, we have destroyed the effect of the sentence. A sentence delayed for years, comes often too late to remedy the grievance complained of.

And to what purpose has this form of procedure been established? Does it not gratify the Natives? Certainly not: they complain of it as a hardship. Does it bring any advantage to the Government? Far from doing so, it incurs a heavy charge in the increased expences of the judicial establishment.

It is admitted that forms, when not too numerous, and when properly understood, facilitate dispatch; but the special pleadings of the English law are grounded on a refined subtilty and nice logic, which requires a particular class of attornies, wholly dedicated to this branch of the profession, to understand. The English lawyers admit that the system, when misunderstood, occasions endless altercation.* A mistake in one point, the admission of an irrelevant argument, will lead to various replies and rejoinders, without advancing the real merits of the cause. Where forms are misunderstood, whole days are lost in disputing about the form itself; the advocate, on the one side, affirming that he is ir.

* See Blackstone, B. 3, c. 20.

the right course, whilst his opponent contends that there has been a departure in the pleadings. Precedents are produced on both sides, analogies contrasted, and the merits of the cause lost sight of during the debate on this point. The right given by the regulations to interchange the pleadings eight different times, leads to great prolixity. The Vakeel does not know when to set bounds to his arguments: nor is it every Zillah Judge who can instruct him. Some are, no doubt, competent to do so; but rules of difficult execution are seldom productive of much benefit. What is easily practicable, is preferable to that which is barely possible.

Arguments, to the above effect, have often been urged in favour of summary proceedings; and it must be acknowledged that they are countenanced by a very numerous class of Indian Servants. The first impression of the mind is naturally in favour of a simple and speedy administration of the law; but this impression is counteracted by the experience of society, and the judicial establishments of all civilized nations.

It is now proper to state the arguments on the opposite side of the case, and to observe the reasoning of those who contend for a regular form of process.

In support of a systematic process it is maintained, that forms are necessary, because they give certainty and precision to the proceedings,

and because they operate as a check upon the arbitrary disposition of the judge. All men naturally wish to enlarge their authority, and to possess the power, even when they do not feel the inclination, of doing strong acts.

Et qui nolunt occidere quemquam, posse volunt.*

Forms have accordingly been introduced in every country where justice has been regularly administered. The Romans, from whom the great line of all European jurisprudence is derived, paid particular attention to this article.† They, in reality, when properly understood, forward the dispatch of business. In a trial by jury in an English court of justice, it might often seem to a mere spectator, from the facility and dispatch with which the whole is conducted, that no particular form was prescribed, every one, the advocates and judge, appearing to speak and act without any check or restraint: but this facility is only the effect of a settled course of rules, by which one act succeeds to another, the first producing the second, and so on in rotation, until the whole is completed. As in the evolutions of an army, the precision of the movements is always in proportion to the form and order with which they are placed. Intelli-

* Juv. Sat. 10.

† Sunt jura, sunt formulæ de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut ratione actionis errare possit. —*(Oratio pro Q. Roscio Comœdo, sec. 8.)*

gence and dexterity in the execution, is a natural and necessary consequence of practice.

The forms of pleading are more strictly observed in English practice than in that of any other country; and, as a consequence, justice is more speedily executed.*

It is impossible for law to be administered in any court, where well-educated judges preside, without insensibly producing a certain course of forms, as operating to their own conveniency and to that of the suitors. It is on this principle, that the rules of court, as they are styled, or the forms of trial, have been gradually introduced in every country, occasionally altered and modified, until they have acquired a certain degree of perfection,

* "In England, a cause in which a jury is employed is sooner "terminated, it has been said, than without a jury a cause of "the same nature would be in Scotland."—(Letters from Mr. Bentham to Lord Grenville, on the administration of Civil Justice, in letter 4, page 89.) "Not many years ago an appeal "was brought to the House of Lords from the Court of Sessions "in Scotland, in a cause between Napier and Macfarlane. It "was instituted in March, 1745, and after many interlocutory "orders and sentences below, appealed from, and reheard as "far as the course of proceedings would admit, was finally "determined in April, 1749; the question being only on the "property in an ox, adjudged to be of the value of three "guineas. No pique or spirit could have made such a cause "in the Court of King's Bench or Common Pleas have lasted "a tenth of the time, or have cost a twentieth part of the ex-"pence." *Blackstone's Commentaries, vol. 3, page 392, note.*

suited to the habits and manners of the society in reference to whom they were created. It ought always to be borne in mind, that in His Majesty's Court in India, all the European forms are preserved without inconveniency. The difficulty, therefore, does not arise from the thing itself, but from the manner of using it.

Such are the opposite arguments which have been, or may be given, on the subject of this important and intricate question.

The administration of the law, at present, is certainly attended with many of the evils of a regular system, without being productive of all its benefits. The expence of conducting a suit in the Courts of Adawlut is equal, if not greater than in any of His Majesty's Supreme Courts, and the delay infinitely greater, whilst the probability of a right decision is in favour of the King's Courts.

In what do the evils of the law consist in any country, but in a multiplicity of laws, an increased litigation, an expensive process, and vexatious delay? And evils of that sort never come alone. They bring along with them a number of disagreeable companions, and have a natural tendency to deteriorate the morals and sour the temper of the people.

But we shall show that those arguments are illustrated by facts, and that where justice ends force begins. Let us hear the report of one who

speaks both as a witness and a judge. In the first capacity, he describes the facts, and in the latter he traces these to their origin. Writing in reference to the province of Bahar, Mr. Seton, one of the Patna Judges, says, "The commit-"ments for breaches of the peace (arising from "boundary disputes and other contests concern-"ing landed property) are ascribed to the great "though unavoidable arrear of untried causes "pending in some of the courts; since by ne-"cessarily protracting for years the decision of "suits, it frequently drove the suitors to despair, "and induced them to run the risk of taking "justice into their own hands, by seizing the ob-"ject in dispute, rather than to await the tardy "issue of a process, which threatened to exceed "the probable duration of their own lives.*

We have stated the evils; it remains to deliberate on the remedy. In parliament it is said no one should object to a tax, unless he can propose another in its stead.

If the multiplicity of the forms, as at present established, leads to delay, the proper remedy consists in a reduction of these. The natural progress of society is from simplicity to refinement; but this progress has not been observed in the judicial establishment. The first steps should

* Letter of Mr. Seton, Judge of the Court of Circuit for Patna, 20th June, 1798, as given in the Fifth Report.

have been marked by simplicity; forms would gradually have increased with the habits of business, they would have been moulded with the nature of the subject itself, and have grown into dexterity under the daily practice of the courts.

It seems necessary, therefore, to reduce the existing forms to a level with the present state of things, and to trust to time for further improvement. A large discretion should be given to the judges. In cases not open to appeal, no more of the evidence should be recorded in English, than is necessary to give a general notion of the cause. The right to appeal from the Zillah Court should be greatly narrowed.

It is a singular fact, that in the trials of petty causes before the Native Commissioners, all the evidence is recorded in writing, and the whole regulated by a variety of forms, and subjected to different fees. It must often happen that the expences of the suit exceed the value of the thing sued for.

An argument has been sometimes grounded in favour of the Native Courts, as existing previous to any judicial establishment by Europeans, that the people were satisfied with that mode of decision, and had no idea of any better. The fact is doubtful. Men are never satisfied with injustice.* In all despotic states the greatest dis-

* Volney, speaking in reference to the administration of justice in Turkey, observes that "the parties are never very well

satisfaction prevails. On entering any of the large Indian Capitals of the Native Princes, nothing is to be met with but pictures of chagrin and discontent; it is only in the European settlements that we meet with the cheerful countenance and the confident look. This contrast never fails to strike an attentive observer, on returning from an Indian capital to any of our great towns, such as Calcutta or Bombay.

But the circumstance, if true, that the people had no idea of a better system, implies in fact nothing. The people of Turkey have, perhaps, no idea of a better system of justice than that which prevails in that country, as they regard it as a part of their religious code, and as dictated by the infallible Koran, their dissatisfaction being founded on the conduct of the judges, rather than on the theory of the law itself. But is their system, therefore, a good one? The question is not what the people think, but what they feel; what effect does the system produce on the commerce, industry, and general improvement of the country?

It seems difficult to conceive why the Natives should feel any dislike to our forms, otherwise than as they find them productive of expence and delay. So far from any dissatisfaction being felt by the Natives against the process in the King's

"satisfied with the decision of their judges."—*Vol. 2, page 390.*

Courts, nothing is more certain than that they contemplate that system with admiration and respect. They like to witness the ceremonial of the court, the gravity of the judges, the costume of the profession, the harangues of the advocates, and that general style of decorum, method, and business, which distinguishes a jury trial.—"Justice (says Mr. Burke) is grave and decorous." These qualities are predominant in the character of the Indian, and will accordingly always command his respect wherever they are to be found.

CHAPTER XIII.

On the Multiplicity of the Regulations.

THE number of the laws constitutes the great distinction betwixt a free and a despotic government. In the former, everything is regulated by prescribed rules; whilst in the latter, matters are left, in general, to the discretion of the magistrate. In Turkey the laws are few, and the oppression is general; in England the laws are numerous, but the protection is great. The advantages to be derived from a regular code of laws are too obvious to be insisted on; the difficulty consists in ascertaining their proper extent.

A multiplicity of laws is not unattended with a variety of evils: it leads to great difficulty and uncertainty in the various and contradictory interpretation to which they are so often made liable. "Where the laws be few, they leave "much to arbitrary power; but where they be "many, they leave more: the laws in this case, "according to Justinian and the ablest lawyers,

" being as litigious as the suitors."* A writer of great eminence ascribes the vast number of law suits which prevailed in his time in France, to the multiplicity of laws by which that country was distinguished.† Similar effects must be expected, from like causes, in Bengal. As yet, perhaps, the act of interpreting the Regulations has not been carried to any great extent; but laws will naturally produce lawyers. A former Governor and Council of Bengal, in their disputes with the Chief Justice, (Sir Elijah Impey,) state that they have been instructed in legal knowledge by these contests.‡

It is true, that few of the regulations create new rules as to the domestic relations of society, these being left, in general, to the laws of the Natives. Yet still they carry reference to important interests of individuals, in the revenue payable by them to government; and wherever men can have an interest in disputing the meaning of a law, they will naturally do so.

But the existence of the rule is not altogether the point complained of. The rights of property ought always to be recorded in some written form. These rules have undergone a variety of

* Oceana 56.

† Bodinces de Res-publica, l. 6, 756.

‡ General Appendix, No. 13, to the Patna, Dacca, annd Cossijurah cases.

alterations and changes since their first institution in 1793, and these alterations are every day increasing.

It will be said, that the number of laws, and the frequent changes which they undergo, indicate a constant attention, on the part of Government, to the well-being and protection of the Natives. They certainly do. They are a monument to the integrity and virtue of the British Government. But this fluctuation has a natural tendency to detract from their weight, and to lessen the respect of the natives for the consistency of their rulers.

A law is not, therefore, a defective one, because all the good intended has not immediately followed. A certain portion of time is necessary to ripen and accommodate the habits of the people to the change; and experience is required to determine its excellence, as objections are often found to proceed from ignorance or prejudice. The modern French code has wisely enacted, that " supplementary articles may be added, but " no essential alteration can take place until it " has been ten years tried. The advantages, the " disadvantages, and the national opinions con- " cerning it, will then be known; in the mean " while the Tribunal of Cassation rectifies any " material errors and wanderings of the inferior " tribunals. But this power merely extends to

" interpretation of the law."* There is no complaint more general against the system, nor perhaps better founded, than the great facility which has been given to the promulgation of new rules. It is perfectly foreign to the disposition of the Natives, which inclines them, above all things, to stability and uniformity of conduct.

A great proportion of these rules carry reference to matters of practice, in the hearing and trying of causes. Now, in the trial of suits, as in every thing else, custom or use produces facility and dispatch; rules of this sort ought, therefore, never to be changed for new ones, unless where they are found to be fundamentally bad. There is a certain connexion of ideas, a readiness of apprehension, and a dexterity in the execution, which every man insensibly acquires, by doing that which he has been long accustomed to do, and which, from the facility of practice, makes up for many defects.

In every country, much has been left to the discretion of the judge, as to the interior economy of his court. A regard to his own conveniency will always incline him to forward the dispatch of business, and time and observation will point out to him the most proper means of doing so. A material distinction is to be borne in mind between the law itself and the manner of carrying

* Introductory Discourse to the Code Napoleon, by B. Barrett, page 392.

it into effect. Whilst the law should be positive in its enactment as to the rights of persons and things, it should, nevertheless, be liberal in the direction allowed to the magistrate to carry these into effect. The most convenient mode of execution cannot always be precisely foreseen, and ought not therefore to be strictly enjoined: and it is on this principle that the rules of court for the trial of causes are, in a great degree, discretionary in most countries.

"It is to be observed," says Pothier, "that many "things arise in the trial of a cause which are left "to the prudence and discretion of the judge. "For so is to be construed the saying in the Ro- "man law: it is not necessary that there should be "a law for every act which a judge is required "to do."*

The difficulty of construction from the many references, in one regulation to another, and often references to a reference, which is to depend upon a third and fourth allusion, occasions much difficulty to even a European reader: to a Native the difficulty must be increased.

It might too much resemble verbal criticism, to justify this remark by particular quotations; but no justification will be thought necessary by

* Pothier's Edition and Notes on the Pandects, vol. 1, page 185, sec. 66. See the speech of Lord Bacon on taking his place as Lord Keeper in Chancery, Shaw's Bacon, vol. 1, page 398.

those who have had frequent occasion to consult the regulations.

A great proportion of the code is made to consist of expository matter.* The legislative sense is lost in the discursive matter with which it is surrounded. To remedy every misinterpretation of the laws by new enactments, is an endless labour. The proper and natural remedy is to be found in the exposition of the law which the superior court gives in cases brought in appeal before it.

By the Regulations passed in reference to one of the Hindoo Temples, (the Pagoda of Jagaurnaut), great care is taken to secure the sanctity of the place from the hands of any but the Priests. Amongst other rules to that effect it is enacted, that the Revenue Bailiffs, or Peons of the Collector, shall not enter the temple.

But this regulation is hardly passed before another is issued, to declare that it was not intended to prevent the Peons of the Collector from entering the temple for the purpose of devotion, the same as any other class of Hindoos.† Nothing certainly could be more unnecessary than any explanation to this effect. In every civil case where the law is doubtful, the inter-

* See clause 2, reg. 1, 1801, as to reports not having been made by the collectors.

† Ben. Reg. 1806, reg. 4, sec. 21.—Ben. Reg. 1806, reg. 5, sec. 4.

pretation of the statute is part of the statute itself.

But legislative zeal has even led to more exceptionable enactments than the above.

Regulation first of 1801 has for its object the explanation and amendment of certain former rules for the collection of the public revenue.

It declares under what circumstances the collector may attach the estate or farm of any proprietor or farmer for arrears. Section two exhibits the following rule. "Whenever the collectors and board of revenue may not judge it "expedient to attach the lands for the purposes "above recited, but shall be of opinion that the "public revenue is wilfully withheld by the defaulter, or that the arrear is ascribable to his "neglect, mismanagement, or misconduct, it "shall be competent to the board of revenue to "impose a penalty of one per cent. per mensem "on the arrear, in addition to the prescribed "interest, to be paid from the time when the "arrear may have become due until it be discharged, or until the estate or farm of the defaulter may be attached, (in which case the additional penalty in lieu of attachment is to cease,) "and to be levied in like manner as the interest "is directed to be levied, viz. in the same manner as other revenue demands are enforced "under the existing regulations."

It were almost superfluous to remark on this clause (which has been omitted in the code for Oude), as it must be obvious that, as no man intends to mismanage his own affairs, so no legal penalty can ever instruct him how to manage them to more advantage. All desire and follow what appears good to them.*

But under the mild administration of the Revenue System, we are far from believing that the above rule, however objectionable in the abstract, has ever led to any bad effects. It was impossible, however, not to advert to it, in a work which has for its object an inquiry into the principles and operation of the Judicial System: connected with this view, another defective rule shall be instanced.

The fifty-third Regulation of 1803 enacts the punishment to be adjudged by the Criminal Courts of Judicature, in cases wherein a discretion is

* What is it to mismanage a man's own affairs? What is implied by this vague term? How is the line to be drawn? what are the degrees of bad management that shall incur the penalty? and how is the evidence of the fact to be obtained? Can a judge, or any public officer, form so proper an estimate as the proprietor himself, of the attention and expence due to the improvement of a particular sort of property in preference to another? The expence, otherwise due to the farm, may have been imperiously called for as to other objects, engagements in trade, manufactures, the incidents of his family, their education, sickness, &c.

left by the Mahomedan law for defining the crime and punishment of robbery by open violence. By clause four of section four it is enacted as follows: "Persons convicted of going "forth with a gang of robbers for the purpose of "committing robbery, but apprehended before "they have committed such, or have made any "violent attempt for the purpose, so as to bring "them within the provision contained in the pre-"ceding clause, shall be adjudged to suffer im-"prisonment and hard labour, for such period, "not exceeding seven years, as the circumstances "of the case may appear to merit."

The principle in modern Jurisprudence is distinct. A mere intention to commit a crime is never punishable, unless attended with some inceptive act. Even in the crime of high treason, it is required that the intention, the compassing or imagining the death of the king, be demonstrated by some open or overt act. (*Blackstone, Book* 4, *Chap.* 6.)

The Law here does not punish a man for committing or attempting a crime, but for not having committed such, or having made any violent attempt for the purpose.

But as severe Laws, in a regular society, always lead to lenity, the clause following the above admits, under extenuating circumstances, a mitigation of the sentence. This is all very well: yet still it does not justify the insertion of

a penalty, which from its very nature is repugnant to the principles of legislation.*

Too much reliance appears to have been placed on the mere enactment of regulations, as if these administered justice. But laws, according to Libanius, are of no force without judges to put them in execution. Bare statutes have neither ears to hear our cause, nor feet, nor hands to hasten to us and defend us; but all the assistance which justice gives us is conveyed by its ministers.†

Whilst the objects enacted are too numerous, the language is also too diffuse: but in laws, as in last wills or testaments, the fewer words that are used the less number of law-suits is likely to spring from these.

The code, at present, extends to upwards of seven folio volumes, including the Regulations for all the different provinces. This is a bulk three times more extensive than the whole body of the civil law. To understand these volumes

* The law recalls to recollection an observation made by Mr. Pitt, in the trial of Mr. Hastings. Mr. H. was accused of having formed some plan, not approved of by his prosecutors, but which, in reality, he had never carried into effect. "To "punish the accused on these grounds," said Mr. Pitt, "would "be much the same as to punish a man for having gone out to "commit a highway robbery, but which he had never at- "tempted."

† Law of Nature and Nations, by B. Puffendorf, page 73.

is, of itself, a labour of no small difficulty; but a judge is further required to possess a knowledge of the laws of two other nations, the Mahometans and the Hindoos. The volumes in reference to the institutions of both these people are numerous, the rules intricate, and made subject to various modifications and exceptions, as arising from the numerous divisions of sects and casts.

Of the matter contained in the several volumes of the regulations, not one-tenth part is perhaps efficient, the rest consisting of regulations which have been rescinded, of repetition of rules, and of explanatory matter. The naked enacting law, if stript of its superfluities, would be contained in a very narrow space.

Justinian, in his second preface to the Digest, has observed, that it is much better that some things, however fit, should be omitted, than that men should be oppressed with a number of unnecessary enactments.

As a number of needless rules weaken the force of those which are necessary, they also impress the mind with the occasion for further provisions being made for particular cases. Where the law has thought it necessary to pass an enactment in reference to a matter apparently trivial, the mind naturally looks for some legal sanction in a subject of similar, or perhaps of greater importance; and accordingly, when the regulations are silent,

and no precedent occurs, the judge is apt to think that he has not power to proceed. And this is agreeable to a principle in the Roman law, and indeed to a dictate of natural reason. The thing which was rendered legal by a particular condition or enactment of the legislature, does not appear to have been inherent in the nature of the subject itself, or warranted by the common law of the land. An act of parliament giving authority to enable Navy Courts-martial to punish the crime of perjury, was held to imply that the Army Courts-martial had no right to do so, inasmuch as there was no act of parliament to authorize the measure. But every law implies the right to the means necessary to carry it into effect, where such means are not derogatory from the rights of individuals.

A law founded on a particular reason, cannot extend to a case differently circumstanced; but general laws are to be understood generally. The modern French code has enacted, that the judge shall not defer passing sentence on pretence of a defect of the law. This principle has been quoted with approbation; yet it is to be found in a maxim of the English law, that for every wrong there is a remedy.

Throughout the regulations the greatest care has been taken to preserve inviolate the laws, the customs, and prejudices, of the Natives. In many instances, it is true, the severity of the

Mahometan criminal law has been softened. Some few alterations have been made as to the Hindoo institutions; but the ancient law is always to be regarded as prevalent, unless where an alteration has been expressly enacted. Regarded as a general whole, the code is the fairest monument to British virtue: considered separately, in it, as in every other, many defects are to be found.

CHAPTER XIV.

On the Delay attending the Decision of a Cause.

WHEN delay arises in the administration of justice, the first idea that occurs to the mind is to ascribe it to some fault in the conduct of the judges, or to some defect in the constitution of the court. It may, however, be owing to causes perfectly independent of either of these. The conduct of the judges may be altogether correct, and the constitution of the court formed on just principles; and yet, from the jurisdiction having been originally too extensive, or from a subsequent gradual increase of business, the number of causes may be too many for any tribunal to decide within the proper terms. This observation is illustrated by the circumstances lately attending the Court of Chancery in England. The arrear of business had become very great; yet no blame was imputed, or imputable, to the diligence of the chancellor, nor was any defect perceivable in the original constitution of the

court. It had arisen from natural causes in the augmented business of an increasing metropolis. The remedy adopted was the institution of a second, or vice chancellor, and the allotting to him a certain portion of the business.

A similar remedy has occasionally been resorted to in Bengal, by the erection of a second court within the same district; but the expence has been found greater than what the revenues of the country can afford.

The period of time which a suit may occupy, from its first institution in the inferior court to its ultimate decision in the Sudder Dewannee Adawlut, may be estimated, from a view of the cases reported in 1805, and the period preceding; the longest term that any cause had remained undecided being twelve and thirteen, and the lowest three years: one case, indeed, had run the length of twenty-one years. An appeal to the King in Council will extend the ultimate decision to a further period of two years. In England a suit seldom lasts longer than seven or twelve months: an appeal is regarded as tedious which occupies three years. There is nothing which men are so unwilling to do as to pay money, few choosing to do so before the law compels. But this unwillingness is naturally increased, from the delay which must attend an application to a court of justice in Bengal. How then can it be matter of surprise to see so many

causes on the file? The debtor smiles at the institution of a suit which he knows cannot be heard for many years. He enjoys, in the mean time, the use of the money, and all the profits of trade, in a country where the returns greatly exceed the legal interest; and although he may foresee that the law charges will ultimately fall heavy upon him, yet in the enjoyment of the present hour, and in the various chances in his favour which procrastination has a tendency to produce, he shuts his eyes to all the consequences. Time can seldom strengthen proof; it is calculated to weaken and destroy it altogether: it is therefore favourable to the debtor. Instead of inducing men to pay their debts, our courts hold out the strongest temptation to withhold payment. Where the files of the court are clear every term, the debtor dares not shuffle or procrastinate, because he knows that legal compulsion will be the consequence. In His Majesty's courts in India there is a brisk and speedy administration of the law. There is no arrear of business: the files are cleared every term; and as a natural consequence, no more litigation is to be found amongst the natives than what exists in any other state of society.

CHAPTER XV.

On the subject of the Judges.

THERE is no part of the Judicial System of more importance that than which carries reference to the education and learning of the Judges, and there is none to which so little attention has been paid.

Good laws are of little avail, without good judges to administer them. An intelligent judge may correct the evils of a bad law, but a weak and ignorant one will too often defeat the most salutary institutions. On a first view of the subject, one might be led to suppose that the same period of society which gave birth to wise enactments by the legislative, would also ensure to the public a regular administration of these in the person of the judges. The history of our own country will afford an instance to the contrary. The reign of Charles the Second, was distinguished by the most salutary improvement in the laws, whilst, at the same time, the greatest abuses prevailed in the courts of justice.

But incongruities in legislation are not peculiar to the annals of our country. Some of the worst periods of the Roman History were not only remarkable for excellent laws, but also for judges of eminent virtue and learning. "Under "the weakest and most vicious reigns, the seat "of justice was filled with the wisdom and in- "tegrity of Ulpian and Papinian, and the purest "materials of the Code and Pandects are inscri- "bed with the names of Caracalla and his mi- "nisters."*

In Europe, a Merchant is a trader, and the Judge a man of the law. The establishment of the Company's service has not, as yet, arrived, or is supposed not to have arrived, at that period when these professions come to be separated and assigned to different classes of servants, who in their early studies are to be instructed in those branches of knowledge most suited to the profession for which they are intended. Men are one day employed in the Commercial department, the next in the Diplomatic line, and afterwards find themselves placed on the Bench: the consequence is, as might be expected, judicial duties are discharged without much intelligence or method. How then can it be matter of surprise to find that the progress of the courts is tardy, the judgments are contradictory, and the appeals are frequent?

* Gibbon's Roman History, chap. 44.

On the first establishment of the courts in Bengal, it was a favourite and fashionable mode of praising the system, to say, that it was relieved from the defects and abuses incident to the King's Courts, by having no lawyers employed. Such a paradox could never have found currency amongst men of education, but from the great mischief that had recently arisen, under particular circumstances, to the province of Bengal, from the magistracy of Sir Elijah Impey.

There is a sort of vulgar prejudice, that imputes to a regular establishment of courts of law, the occasion of litigation and the prevalence of law-suits. Experience has proved how unjustly this opinion is founded. During the period that a Mayor's Court existed in the different Indian capitals of Calcutta, Madras, and Bombay, the prevalence of litigation was much greater than at present, when men's rights are secured to them by the forms of law, the advantage of a regular bar, and the learning and integrity of well-educated judges. The truth is, that a spirit of litigation is rather to be ascribed to ignorance than to a knowledge of the laws.

The eminent statesman who presided over the Company's affairs in India in the year 1805, in one of his addresses to the students in the College of Fort William, earnestly recommended to them the study of jurisprudence, as a qua-

lification essential to the due discharge of their after duties in the judicial line.*

It has been observed, that no attempt is more dangerous than that of endeavouring to illustrate a subject, which in its very nature is obvious to the understanding. How then shall we go about to prove, that an advocate should understand law, and a judge have a perfect idea of judicial duties?

There are, however, some men to be found, who believe, or affect to believe, that the dictates of natural reason are alone sufficient to discover the equity of any case. If by natural reason, is meant reason unassisted by legal culture, we deny the position; equity is to follow law, and the former can never be estimated but by a distinct apprehension of the latter. We must first know the positive rule, before we can estimate the relief entitled from the particular circumstances of the case.

The judgment of the law is uniform, but the judgment of individuals discordant and contradictory. The good sense of one man is not the good sense of another. Why do the Courts of Adawlut display so many inconsistent judgments,

* We regret that the Speech made by the Marquis Wellesley, on that occasion, is not at hand for reference; and we will not hazard the danger of detracting from its beauties, by an imperfect attempt to express its import.—*Timui post Roscium in scenam descendere.*

whilst in His Majesty's Courts the decisions are uniform and regular? Because in the former the judges have no regular standard, and in the latter they are bound by a fixed rule.—And this want of uniformity is one great cause of litigation.*

Theory without practice can never produce a full and solid knowledge of law; but practice without theory is altogether dangerous and defective.

But the necessity of legal knowledge will be admitted.—The only question is, how that knowledge shall be best attained? This is perhaps a difficult question; there being, according to Lord Bacon, no receipt to make a lawyer in a hurry.

To a casual observer, a failure of justice is more apt to be ascribed to a defect in the law than to a faulty administration of it. We incline to the opposite opinion, and believe that the Civil institutions of almost every state will be found to afford a very tolerable security to the property of the subject, if prudently administered by upright and learned magistrates.

The Regulations for the Judicial Establishment are objected to as numerous. They extend, in their present shape, to seven volumes. In reality, however, the existing and operative rules,

* Of the difficulty in deciding a case by the unassisted dictates of natural reason, a good illustration may be found in Domat's Civil Law, vol. 1, cap. 2, p. 38.

if separated from those which have been repealed and stript of redundant and explanatory matter, would not exceed the bulk of one single volume. But admitting their utmost extent, they carry no reference, in that respect, to the Statute Book of the Laws of England, which, instead of seven, will be found greatly to exceed seventy volumes: yet these form no clog to the speedy and regular administration of justice, either in India or the Parent State.

If the judge on a trial gives a judgment different from the law, if that judgment is reversed on the appeal, and if the appeal is in its turn reversed by the higher Court, these are not the faults of the system, but of those who administer it. The Law, says M. D'Aguesseau, is answerable for the inconveniences that sometimes occur in following it; but man is responsible for those which arise when he swerves from its regulations.

We do not, by these remarks, mean to imply any thing to the disparagement of the persons holding judicial situations. A man can only be expected to practise an art in so far as he has learned it.

In Europe, no one is allowed to appear as an advocate, until his mind has been refined by five years' attendance in the Courts; and it is further required, that he shall be a Barrister of at least five years' standing, before he can be placed on the Bench. If these two probations do not

always ensure learning, they at least exclude juvenile indiscretion from the judgment seat. From the multiplicity of trivial duties assigned to the judges in Bengal, no leisure is afforded for study: the whole day is occupied in the detail of subordinate duties. In Europe, the most common duties have a tendency to enlarge the sphere of judicial observation. The removal of a pauper from one parish to another will divide the whole Court of King's Bench in opposite opinions, and give rise to learned and elaborate arguments.* These advantages are wanting in Bengal. The Bar is silent; the press never records the case in the prints of the day; the opinion of the public (that useful monitor) is never exercised in censure or approbation on the passing conduct of the judges.

The uniformity in the decrees is not the only advantage to be derived from the learning of a judge. An acquaintance with general principles, and the habits of judicial reasoning, contribute essentially to the dispatch of business. An experienced judge has to go in quest of

* During the long period that Lord Mansfield presided in that Court, only three divisions of opinions are said to have taken place amongst the judges: of these, one carried reference to the removal of a pauper from one parish to another. But in bearing allusion to this singular unanimity, we beg not to be understood as affixing any approbation to that circumstance: it can only show the leading influence of the President of the Court.

authorities, and if he is anxious to do right, to deliberate long before he ventures to pass a decree on a new or difficult case.

The mind, from being early instructed and long familiar with particular habits of thinking, acquires a facility of arrangement and a readiness of apprehension, altogether unknown to a man of perhaps superior natural parts, who comes new and uninstructed to the consideration of the same subject.

Two difficulties, at present, arise in the Courts of Adawlut: a danger from hasty decisions, and a delay from refined judgment. To trust to the opinion of the native Law Officers, would place the administration of justice too much at their disposal. Under such circumstances the judge must act for himself. If he gives a speedy judgment, the danger of error is considerable; if he delays his sentence until he can satisfy his doubts by a reference to books and written authorities, the progress of the Court must be often interrupted by expensive delay to the suitor.

Of the advantages to be derived from intelligence and method in the hearing of causes, the best illustration will be found in the following quotation from Reports in the Court of King's Bench in England in the year 1770. "I am informed," says the Reporter, "that at the "sittings for London and Middlesex only, there

" are not so few as eight hundred causes set " down in a year, and all disposed of; and yet, " notwithstanding this immensity of business, it " is notorious, that, in consequence of method " and a few rules which have been laid down to " prevent delay, (even where the parties them- " selves would willingly consent to it,) nothing " now hangs in Court." (Burrows' Reports, V. 4, p. 2583.) Nor does the above statement include all the business transacted by the judges in that court: a very considerable proportion of causes, both Civil and Criminal, comes to be tried by them in the circuit.*

Let us now advert to the progress of decisions in the courts of Adawlut in Bengal. In the course of the year 1804, the number of decisions was as follows:—In the Court of Sudder Dewannee Adawlut, fifty-one suits decreed and dismissed; in the five Provincial Courts of

* In the Report of the House of Commons, ordered for printing 1792, on Imprisonment for Debt, the whole number of causes annually tried in Middlesex, in the King's Bench and Common Pleas together, is stated at seven hundred and fifty, which, adding those tried in the Exchequer, would unquestionably not have amounted to so many as one thousand. *Letters to Lord Grenville, by Mr. Bentham, page* 34. But we have no reason to believe that the dispatch is less in these Courts than during the period of Lord Mansfield presiding in the King's Bench. The current business of the Courts is understood to be always dispatched; some arrears in Chancery excepted, and a large arrear of appeals in the House of Lords.

appeal, seven hundred and twenty-six suits decreed and dismissed, and twenty-nine withdrawn or adjusted between the parties themselves.*

We have already had occasion to refer to the collection of decided cases that has been published in Bengal by the authority of the Sudder Dewannee Adawlut: they will, it is to be hoped, contribute in a considerable degree to facilitate the further progress of the courts.

* Fifth Report from the Select Committee of the House of Commons on India Affairs, page 171.

CHAPTER XVI.

On the Expediency of abolishing the Vakeels, or Black Pleaders, and creating an European Bar.

WE have already had occasion, in a former part of this inquiry, to advert to the detriment which has arisen to the system from the establishment of Vakeels. The employment of a set of black advocates in courts presided in by European judges, could only have arisen from a want of civil servants, at the first period of the institution, sufficiently acquainted with the languages and customs of the country to be employed in the management of causes. That objection is now, in part, if not entirely, removed. A knowledge of the language is now possessed by almost every civil servant, and an acquaintance with the customs and civil institutions of the Natives is rapidly advancing.

Of the various objections that have been urged against the black pleaders, none is more generally admitted than their disposition to encourage

litigation, by holding forth false hopes to their clients. Whenever a man suffers, or thinks that he suffers an injury, the first movement of his feelings leads him to look to the law for redress. It is at this point that the duty of an advocate commences; and unfortunately, his interest and his duty are here too often placed in opposition.

There is every reason to believe, that a very large proportion of the suits brought in the Adawluts for trial would never have been attempted in His Majesty's Supreme Court. Here, then, is an advantage, in the very first stage, that may be expected from the employment of civil servants as advocates. From the moment that the cause is put upon the file, the property is regarded a *chose en action*, and cannot become the subject of commerce; it may remain for many years in that state, locked up from the possibility of transfer. It is therefore an object of the first importance, that clients should have access to the best advice, before they put themselves or their neighbours to needless and ruinous expence.

Next to the advantage to be derived from the discouragement of law-suits, that of shortening the process and hastening the decision of causes is the greatest. The nature of the pleas can seldom be fully understood by the black pleaders. An European mind, if seasoned with the usual education, will be found to possess many

facilities in this respect. A want of knowledge leads the advocate to make many efforts to conceal the defect: he multiplies words rather than arguments, and says a great deal lest he should not appear to have said enough; whilst intelligence and method have a natural tendency, in this, as in every thing else, to facilitate dispatch. But the want of intelligence is in nothing more observable, than in the too great number of witnesses that it always induces a prosecutor to produce. This is an abuse too general in all trials in the Courts of Adawlut, and in committees of inquiry ordered by Government. From a prosecutor having no fixed points in his mind on which the gist of his case is to turn, and not knowing how to estimate the effect of evidence, he thinks it best to bring forward a general history, rather than a particular case; to state every thing, to prove every thing, and never to stop until he has exhausted his subject, himself, and the judges. The consequence is, as might be expected, great contradiction comes to be found in the details of the different witnesses; the judge is distracted with the variety of matter brought before him by both parties (as the defendant finds it incumbent upon him to be equally large in his proof), and nothing but a doubtful sentence can be pronounced. Where the witnesses produced are sufficient to account for the fact, and to throw the necessity of refutation on

the defendant, the prosecutor has made out his case, if the rules of law have been observed. The production of a number of witnesses indicates a distrust in their veracity, and is a great oppression to the opposite party; the civil law has accordingly vested a judge with the right of moderating their number. In the English Courts of common law, the art of cross-examination has been brought to such perfection, that any attempt to carry a cause by a multitude of witnesses would be immediately defeated.

It is an observation made by the celebrated Bodin, and illustrated by daily experience, that one great cause of the uncertain result of law-suits arises from causes being more ably conducted by one advocate than by another.

If it be true, as has been asserted, that the process in the Courts of Adawlut is more expensive than the proceedings in the Supreme Court, the suitor may very well afford to pay the advocates, in order to ensure at once a more speedy and precise process, as the duration of the suit always leads to an increase of the expence.

The several advantages to be expected from the abolition of the black pleaders, and the employment of civil servants as advocates, are too obvious to be insisted on. The creation of a Bar will have a natural tendency to give rise to a spirit of rivalry and investigation amongst the younger branch of the service; for to whatever

cause it may be owing, there is nothing in which men are so ambitious to excel as in the art of speaking. It will give a check to that litigious disposition in the natives, so much complained of in the Courts of Adawlut, but so little, if at all, perceivable in the Supreme Court.

It will bring the trials more frequently under the eye of the public. It will, as already observed, tend to accelerate and to ensure regularity in the process; and finally, it will form the best school for the future judges.

The duties may at first, perhaps, be with difficulty discharged; and the advocates must, for some years, yield the palm to the Calcutta bar: *orabunt causas melius.* But they will learn their duties by practising them; and in nothing does practice produce so much facility as in speaking.

The observance of the forms of pleading in civil suits, as already established, when they come to be properly understood, will facilitate the business of the court, by distinctly showing the particular points on which the parties are at issue. Beyond this no part of the proceedings, further than the trial of facts, should perhaps be in writing. In every court, where the arguments on the general merits and law of the case are delivered in the form of written addresses, procrastination is a natural consequence. If these papers are given to the judges, with a view of their being perused during the adjournment, they

are too liable to be hastily glanced over. When a judge retires to his house, he looks for other amusement than the perusal of dry law papers. The advocates are never roused to that exertion by the solitary cold act of composition, as when called on to speak before an audience, ready to criticise their abilities, to remark on their language and address, and to condemn or applaud on the spot. In a written address books are copiously referred to; but these references, although not perhaps so fully given in the course of a speech, are always better fixed in the mind of the person producing them, as he must carry their import in his recollection before they can be quoted. The attention of the judge is better kept awake, and a certain fervor, so essential to dispatch, is always best maintained by the warmth of oral argument.

The black pleaders will fall into their proper sphere as attorneys.

The present establishment of civil servants is not perhaps adequate to furnish the number of advocates that would be required; but that establishment is not fixed by law, and may be increased at pleasure.

We will not suppose that the idea of creating a bar will be disrelished by the judges, because the advocates are the natural check upon the court. We are, on the contrary, persuaded that they will rather encourage the establishment, in-

asmuch as they must feel their own dignity increased, in whatever is calculated to give interest and importance to the tribunals over which they preside.

The black pleaders are certainly not calculated to ensure respect, either in the eyes of the public or of the judges.

There exists, or ought to exist, in every country, a certain degree of jealousy between the bar and the court. In every country we find the judges endeavouring to run down the profession of the advocate, whilst they labour to extol the certainty of the law, and thus to induce the suitors to rely more upon the bench than the bar for redress. The French judges were fond of interrupting the speeches of the advocates by calling for the evidence. "Come ye to the facts, the court know the law." We hear the English judges every day exclaiming, "that facts cannot lie; "circumstances cannot lie; nothing can alter "the nature of a fact; the law is always certain; "right is a fixed principle; justice is always one "and the same; no effort of an advocate, no "eloquence however great can change the nature "of things!"

All this is mighty fine, in the abstract; but alas, how frail and uncertain in the application Where the advocates are tame, the judges are apt to become high and arbitrary; and, on the other hand, where the judges are passive and meek,

the liberty of defending causes and of cross-examining witnesses, has a tendency to produce petulance and presumption in the advocate.

The violent measures pursued by the first judges that went to India, during the period of Sir Elijah Impey, may be ascribed to two causes: the want of an appeal to the public opinion, through the medium of the press; and the want of a full and well-educated body of advocates, sufficient to oppose a check to the arbitrary conduct of the court. At that period, no press, we believe, existed in Calcutta. The bar was humble, and but poorly supplied, either in point of number or talent: the Government was, in consequence, obliged to interpose their authority. In like manner, the want of a bar in the Adawlut System has given occasion to a number of regulations by Government for the correction of judicial errors, which the natural contention in defending and asserting the rights of their clients, by well-educated advocates, would have been sufficient to prevent. In England such interference is happily never required. An able advocate has been described as the natural enemy of the judge; and as all animals are said to be sensible of their bane, he is soon discovered to be so.* From the conflict of such opposite feelings, under the eye of an intelligent public, no evil can ever arise to the administration of justice.

* Quint. 2, 4. 1, 56.

A law can seldom effect a speedy remedy, without being in itself harsh and violent. It is from the collision of the different ranks in society that the public tranquillity is always best preserved. To maintain a due balance of these, and to govern its subjects through the check of their opposite interests, rather than by the endless enactment of laws, must accordingly be the great object of every wise government.

CHAPTER XVII.

Comparison of the original Code with the present, and references to the departures that have taken place from it. Reference to the proposal made for abridging Appeals at Madras, and enlarging the authority of Sudder Courts. Of the advantages and disadvantages incident to the present Judicial practice.

THE object of the present inquiry was to show that the complaints against the Judicial Establishment were less applicable to the system itself, as originally established by Marquis Cornwallis, than to some departures from that system.

Originally there existed no institution fee, and no stamp duties on law papers. These duties are of subsequent creation, and are two great sources of complaint.

Originally, the judgments of the Provincial Courts were final on lackerage or real property, not exceeding one thousand rupees annual produce; on malguzan of one thousand rupees; and in all personal property not exceeding one thousand rupees. At present every cause is open to appeal in Bengal.

Originally, the regulations, as passed in 1793, consisted of about seven hundred and forty folio pages; they now exceed seven folio volumes.

Originally, the law was clear and defined. At present the laws are numerous, and difficult to be understood.

These alterations are the very causes of the three great evils complained of:—expence to the suitor;—delay in obtaining justice;—and increased litigation.

But, it will be said, difficulties were experienced in carrying the system of Lord Cornwallis into effect. This is true: but to what were these difficulties ascribable? To the complication of the machinery. The proper remedy, therefore, was to have simplified the forms, and enlarged the power of the judges, by vesting them with a liberal discretion. The principle has been reversed:—the forms have been multiplied, and the discretion abridged. The administration of justice is more difficult, at present, than on the first institution of the court.*

* Mr. Tytler, at the period of his lately quitting India, left seventeen hundred causes depending on his own file in the twenty-four Purgunnahs. (*Considerations on the State of India, vol. i. p.* 198.) This would seem to indicate an accumulation of causes since 1802, when the whole causes before the twenty-eight City and Zillah Courts only amounted to twelve thousand two hundred and sixty-two.

These circumstances were too obvious to escape notice at the period of instituting the Adawlut System at Madras, in the year 1801. The person to whose care the formation of it was given, in his first Report expressed himself as follows:—"The Bengal Regulations exhibit the "theory of the system; but to judge of its "effects we must look to its practice. It is a "fact of general notoriety, that the files of many "of the Courts of Dewannee Adawlut in Ben-"gal are, at this moment, loaded with causes "which it would require years to determine. "This is alone sufficient to evince a defect in the "system, and that its principles are not calcu-"lated for practice. May not this be owing to "the numerous forms with which the whole is "loaded?" "The set forms of justice," says an eminent writer, "are necessary to liberty; "but the number of them might be so great, as "to be contrary to the end of the very laws that "established them. Process would have no end; "property would be uncertain; the goods of "one of the parties would be adjudged to the "other without examining, or they would both "be ruined by examining too much." *

Accordingly, in the original institutions of the Zillah Court at Madras, its decision was made final on the sum of one thousand rupees. It

* Spirit of Laws, Book 29, c. 1.

was left to the judge to record the evidence in such cases, or not, at his discretion.

But this rule has been since abrogated, and again ordered to be taken into consideration by the authorities in England.

It was proposed to vest larger authority in the Sudder Court at Madras, for the regulation of the process and the correction of inferior errors in the system. It was observed, in the above alluded to Report, "That many of the Bengal "regulations are merely explanatory, and that "too, of some very obvious points in the former "ones. If the occasional doubts of judges are "never to be resolved but by a new law, the "work of legislation must be endless."

A regulation for enabling the Sudder Court to correct the inferior errors was accordingly drawn out and approved of by the Government of Fort St. George; but on a reference to Bengal it was rejected.

We shall conclude by briefly comparing the advantages and evils of the system.

The disadvantages have been already largely, but it is hoped, not unnecessarily dwelt on. They may be comprised under the three following heads:—First, Expence to the suitors; Secondly, Delay in obtaining a judgment; and Thirdly, Increased litigation.

The advantages consist in a gradation of courts, affording a strong check against oppres-

sion. In the administration of justice being vested in the persons of gentlemen of rank and education, who are perhaps distinguished above all the sons of Britain, by the liberality of their manners and the integrity of their character.

In this, as in every other country, the duties of a judge are discharged with different degrees of personal merit and diligence. But the general administration of the law is eminently mild; and every effort is made, by a liberal interpretation, to correct any defects in the Regulations, and to afford comfort and protection to the Indian, not only in his property, but in what is often dearer to him, the prejudices of his religion and the honour of his family.

END OF HISTORY OF THE ADAWLUT SYSTEM.

PART II.

An Inquiry

INTO

THE SUPPOSED EXISTENCE

OF THE

Trial by Jury in India,

WITH

SOME ACCOUNT OF

THE LATE PROPOSED ALTERATIONS

IN THE

Judicial System,

UNDER THE

PRESIDENCY OF FORT ST. GEORGE.

INTRODUCTION.

THE Writer of the following Inquiry having had occasion to see some heads of a plan for the introduction of Arbitration as a system for the administration of justice under the presidency of Fort St. George, he was strongly impressed with the following reflections:

First.—That the nature of a Pinchayeet was not properly understood.

Second.—That the inquiry into the subject of Arbitration, as made by the Government of Fort William, in the year 1772, (and reported in the Sixth Report of the Secret Committee of the House of Commons, in the year 1774,) had not been brought fully under view.

Third.—That a great mistake prevailed in supposing that this mode of trial was not sufficiently provided for by the Madras judicial regulations of 1802.

At an advanced stage of this inquiry, he has had an opportunity of looking into a late publication by Sir John Malcolm, purporting to be a Sketch of the History of the Sikhs. The authority of that work has been greatly relied on, in support of the Pinchayeet System, and a particular extract, for that purpose, selected from the work. The evidence of Sir John Malcolm, when the whole of the passage of his book is brought forward, instead of being favourable to Pinchayeets, only proves, that the administration of justice amongst the Sikhs is, as he expresses it "in a very rude and imperfect state."

The legislation of a country can never be susceptible of improvement, but by the encouragement of liberal discussion on every law as it is proposed. The imperfection of any particular essay, in this way, is greatly counterbalanced by the spirit of inquiry and observation to which it commonly gives rise.

AN INQUIRY, &c.

CHAPTER I.

On the Subject of Arbitration.

THE expediency of establishing Arbitration more generally, as a medium for the administration of justice, has been earnestly urged by some late writers on the subject of India, and strongly opposed by others.

Arbitration is more commonly known in India by the term Pinchayeet, although in some parts of the country it is denominated Subah.

The members of a Pinchayeet are described as mutually chosen by the parties. To prevent corruption and intrigue, their proceedings were openly conducted in presence of such of the inhabitants as chose to attend, and the members were not permitted to separate before they pronounced

their decision, which was afterwards signified to the parties concerned by a written attestation, and enforced, if necessary, by the authority of the Aumildar, or Collector. But the practice of preventing the members from separating until they had decided a cause was by no means general, as it was often, from the nature of the trial, found to be impracticable. In the native governments, the judgment was subject to an appeal to the Aumildar, or Collector of the Revenue.

A great part of the argument in favour of the Pinchayeet System is founded on the presumption, that Native Judges are better qualified than European Magistrates, to feel the effect of evidence, and to perceive when a black man is mis-stating, or mis-representing the circumstances of a particular transaction. But it is to be remembered, that although a European gentleman presides as a judge in a Zillah Court, he has for his assessors two Native Magistrates, a Pundit, and Cauzee; whilst the advocates or pleaders are also natives. But it is said, that these persons are liable to be seduced by the opposite party, and to be gained over by bribes. If bribing is so facile and general, who shall answer for the Native Arbitrators themselves?

A variety of objections occur to all this native system.

The administration of criminal justice can never be vested in native judges, and, in regard

to the common transactions of commerce, in respect to matters of civil cognizance, that nicety of evidence does not often come in question. Men's agreements are, generally, in this, as in other countries, recorded in the form of a written instrument; and writing is said to be a witness very hard to corrupt.

The rules of evidence form, no doubt, an important article in every code of laws. But it is not generally conceived in India, that the great difficulty as to evidence consists in understanding what a witness says. Is not every witness open to cross-examination by the opposite party, and by the court, and to re-examination, under necessary circumstances, by the party who produced him?

How is it in His Majesty's Supreme Courts in Calcutta, Madras, and the Recorder's Court of Bombay? In these courts, neither the judges nor the advocates understand one word of the Country Languages,* yet we never hear, or but seldom hear, of any difficulty from the want of proper interpretation. Perjury, however, we

* This observation is confined to the Judges of the present day. The eminence of Sir William Jones as an oriental scholar is generally known. But it is doubtful if any of the Judges who have succeeded to the bench, since his demise, have applied to the study of any of the country languages. Sir Elijah Impey and Sir Robert Chambers had both acquired a moderate knowledge of Persian and Hindoostannee.

admit to be too common in India. But where is it least so? In the European settlements. And to what is this to be ascribed? To the vigorous and watchful administration of the law, by intelligent and upright European Magistrates.

Perjury is like any other crime; no man commits it, but in so far as he hopes to gain by it. The moment that the fear of detection is greater than the hope of gain, the object to the commission is gone.

Arbitration has, no doubt, occasionally, existed in this, as in every other country. But to what is its origin to be ascribed? To the want of regular courts of justice. No one who possesses a just and legal demand, if the matter be also of value or importance, will ever submit it to the doubtful issue of arbitration, where there are established regular courts of justice to secure to him his right and enforce his claim. No man of prudence will do this; because, in a court of justice, the administration of the law is regulated by system, and the decree can always be, in a great measure, foreseen. But who shall foresee what five illiterate men may determine? When we go to a judge, we go to have the benefit of the law. If we agree to go to an arbitrator, we only do so, because we are unwilling to litigate the matter with a relative or friend, and consent to relinquish a part of our right from motives of good-will, and for the sake of peace

and harmony. And we, accordingly, find that, in every civilized country, law has been formed into a system, and judges appointed in fixed courts to administer it. Arbitration being, from its nature, a voluntary act of the parties themselves, has been left free to their discretion, to resort to, or decline, as their feelings shall dictate.*

It may be here observed, that jurisprudence is perhaps, of all other sciences, the most complicated; and that which is slowest in its advancement to maturity. Every attempt to force its progress has uniformly failed. It seems to keep pace with the general state of improvement in the other branches of knowledge. In every country, the same age that has been distinguished by an advanced progress in the arts and sciences, has, also, been marked by the wisdom of its civil institutions, and the excellence of its laws. All the methods hitherto attempted of administering justice, by what may be called short cuts and by-ways, or otherwise than through the medium of regular courts and established forms, have proved unsuccessful. The code of the great

* In France and in Holland certain cases must be referred to the decision of arbitrators in the first instance. But in these countries arbitration has been formed into a system. Lawyers and judges of the court are often employed in this way. And an appeal lies from the decision. The inefficiency of this mode of obtaining justice is distinctly stated by a foreign judge whose work is referred to in another part of this discussion.

Frederick has been relinquished. The ideas of the French reformers perished in their birth. The Americans found it impossible to establish any system different from that of their ancestors. The excellence of the code of Napoleon is yet to be proved; and the very Pinchayeet system has only prevailed where no other was to be found. But the natives themselves, we are always told, introduced it,—no doubt they did. If Government will not find judges for their subjects, they must find them for themselves. Wherever there is found to be a great defect in the legislative provisions of any government, the community always fall upon some means of supplying the want, and remedying the evil. To what is the origin of duels to be ascribed? To a want of legal remedy for the affront. Hence, Lord Bacon says, revenge is a sort of natural justice. To what was the former excessive interest of money owing in some parts of India? The difficulty of recovering the principal. The interest rose upon the risk. The hazard was part of the price. Why was murder, formerly, the most common of all crimes in India? Because there was no redress in a court of law, and men, accordingly, redressed their own wrongs with a high hand. Since the establishment of regular courts in this country, the rate of interest has been reduced, murders are become uncommon, and arbitration has fallen into disuse.

The great objection that has been all along raised against our present Judicial System, is that it confers too great power on the natives; and has a tendency to introduce an equality of rights, prejudicial to the authority of Europeans. How far this objection is well founded, it may be difficult to say, but an establishment of native judges will certainly produce that effect. It is immaterial, whether you call these Pinchayeet or Arbitrators; they are, in effect, judges, and will be regarded as such by the natives. It will be viewed as a supercession of our European judges. The native influence will gain an ascendance.

Admitting that a Pinchayeet shall pass an equitable award, and that such shall be approved by the parties, how is it to be carried into effect? Natives cannot be allowed to transfer real property, such as a Jagheer or Motah, by their own act, without the intervention of European agency. Arbitrators must not be allowed to pass any decision which shall affect the assessment or the public dues of Government. But if the award is rejected by one of the parties, as partial and unjust, the case can only be settled by an appeal to the law. Thus after all, courts must still exist, either to carry into execution the decrees when submitted to; or to settle the case when the award is rejected. So that, in effect, nothing is gained.

But an expense, it is said, will be saved as to the number and salaries of the judges. Of all saving, a niggard establishment for the administration of justice is the worst. The liberal remuneration which the public has allotted to the judges, is one great cause of the excellent administration of the law in England. Their salaries secure them from temptation, and give dignity and importance to their office. Men, or the generality of men, will always search for money, somehow or another. If the public does not pay them, they will pay themselves. This may be regarded as an illiberal sentiment. But men are not governed by sentiment. "The age of chivalry is gone." What is it that has led to corruption in the judicial character in all countries, but the pecuniary embarrassment of individuals?*

But a saving, it is said, will also be produced

* The Roman judges received no salary. On the trial of Cluentius, one of the judges asked another, If he could not suggest to him some way of not being thus made to serve the public for nothing. "What for nothing," replied the other, and they soon hit upon a method of getting paid. In another part of his works, Cicero carries allusion to the venality of their courts. "If you would know what has produced the acquittal of Clodius, you must look for no other cause than the indigence and want of honour of his judges." *(Letters to Atticus.)* But these were Roman judges; it will perhaps be said, the constitution of Englishmen is different. How far this has always been the case, the reader may consult the excellent Memoirs of Philip de Comines, vol. 2, page 7, English translation.

by a reduction in the number of judges; and one will now suffice, where three were before found necessary. But why have three judges been thought necessary on the bench of Calcutta and Madras? Why not one? A single judge has leisure sufficient to sit all the trials and hear all the causes. Indeed, the number of judges rather retards than facilitates the speedy decision of a cause, as time is wasted in delivering their several reasons for the judgment of the court.

If in courts where the judges have all the advantages of the most finished education, where a regular system of written or common law prevails, where there is a full bar, and the occasional assistance of an English jury, three judges have been found necessary to ensure a due administration of justice, how should a less number suffice, where so many more difficulties are to be encountered? The number of judges is also a check upon corruption; for the few are liable to be corrupted by the few. Nothing is more distressing to any judge possessed of delicacy, and a proper respect for public opinion, than to be obliged to sit alone on the bench, and pass judgment by his single unassisted voice, on the lives and fortunes of his fellow men. A difficulty which has been often felt, and expressed, by persons holding the situation of Recorder.*

* See Sixth Report from the Committee of Secrecy appointed by the House of Commons, assembled at Westminster, in the

But there are some who regard the judicial functions in India as a very easy thing. Not to detain the reader with common-place observations, it may be sufficient to say, that the office of a judge is in no country more difficult than in India. Here, a variety of laws prevail. We have the Hindoo, the Mussulman, and the European, with various sects and distinctions of the two former. Now, every jurist knows that the administration of justice is never so difficult as where a conflict of laws prevails, and where the rules of the one are crossed and interrupted by the dictates of the other. Cases of this sort are of daily occurrence in every court in India. The most eminent judges in His Majesty's Supreme Court have often expressed the difficulty which they experienced by this collision of various laws. But it is such men only that have difficulties. He was a great chancellor, who said that he had usually the misfortune to have more doubts than other men in forming his judgment.* But a Pinchayeet will not be stopped by any difficulties; when they cannot untie the knot, they will cut it.†

sixth session of the thirteenth parliament of Great Britain, to enquire into the state of the East-India Company, 1773, page 8, &c.

* D'Aguesseau.

† The boast of a Zillah judge occurs here to recollection. He had filled the office of judge for seven years, and during

One leading objection against the equity of arbitrators arises from the circumstance of their being always chosen from amongst the most confidential friends of the parties. They, accordingly, carry their partialities with them to the judgment seat, and think that they have best discharged their duty, when they have awarded an equal share of the matter in dispute to each of the claimants.* If an umpire is chosen, the fate of the cause is made to turn too much upon his single vote. If those who have been chosen by the parties, do not decide in their favour, corruption is immediately suspected, and the award is rejected as partial and violent. As the arbitrators cannot be suddenly called together, like a jury, and formed into a court on the spot and at the moment when their services are required, their names come to be known; and as they are not always confined or shut up until they agree in their verdict, but adjourn from day to day, they are subject to the application and importu-

that time had never met with a difficult case. How much more unfortunate is the present Lord Chancellor? He is always falling in with difficult cases; expresses his hesitation and doubts: speaks of the inclination of his opinion, as at present advised.

* See the Semestria of Langlei, an excellent French lawyer, who notices this as a general charge against the employment of arbitrators, p. 229. But he who spares his debtor the expences and vexations of a public trial in a court of justice, ought not to suffer from his liberality in doing so.

nities of the parties and of their friends. The decision that is given to day, is not recognized as law to-morrow.

It appears that the subject of arbitration underwent very particular examination in Bengal in the year 1771 and 1772.*

The president in council had recommended to the supervisors of the several districts the use of arbitration as much as possible in matters of property. The Honourable Court of Directors, in a letter to Bengal of April 1771, inculcate the same principle. Reports were made from the several residents, and chiefs, and council, to the Bengal government on this subject. They all unite in stating that arbitration was found repugnant to the feelings of the natives.

The Committee of the House of Commons, under whose consideration these reports were brought in the year 1773, records the following opinion: "The Committee also find, that in several letters "from the different chiefs to the president and "council, on the subject of arbitration, they "state considerable difficulties occurring in any "regular establishment of that mode of decision, "as well from the reluctance of parties to refer,

* See Sixth Report from the Committee of Secrecy appointed by the House of Commons, assembled at Westminster in the sixth session of the thirteenth parliament of Great Britain, to enquire into the state of the East-India Company, 1773, page 8, &c.

" and of persons chosen arbitrators to undertake
" the office, as from the subsequent delays that
" have been found in the execution of it; and
" therefore concluding that the introduction of
" that plan of decision, in cases proper for it,
" must be the gradual work of time, assisted by
" the encouragement of the Company's servants,
" and could not be brought into practice by any
" establishment of authority."*

The subject has been lately (1814) referred by the Government of Fort St. George to the consideration and report of their servants in the judicial line. These reports have not as yet been submitted to the public; it would therefore be improper to offer any detailed account of their contents. It may, however, with propriety be declared, that they in general tend to show the aversion which the natives bear to arbitration.

In the plan which was drawn up in 1772 for the administration of justice in Bengal, the following rule appears:—

" That in all cases of disputed accounts, part-
" nerships, debts, doubtful or contested bargains,
" non-performances of contracts, and so forth, it
" shall be recommended to the parties to submit
" the decision of their cause to arbitration, the
" award of which shall become a decree of the
" Dewannee Adawlut; the choice of the arbi-

* See Sixth Report.

" trators is to rest with the parties, but they are " to decide the cause without fee or reward. " The collector, on the part of Government, is to " afford every encouragement in his power to " inhabitants of character and credit, to become " arbitrators, but is not to employ any coercive " means for that purpose."

The above rule has been adopted, with some slight variations, in every plan for the administration of justice which has since taken place. It will be found in the sixteenth regulation for 1793 for the provinces of Bengal, &c.; the twenty-first of 1802 for Madras;* the twenty-first of 1803 for the province of Oude. The award becomes a decree of the court, and is only liable to be set aside on a charge of gross corruption or partiality, fully proved to the satisfaction of the court, by the oaths of two credible witnesses.

An enlightened government will always encourage every arrangement which has for its objects the prevention of litigation, and the maintenance of peace and harmony in society. Arbitration is accordingly much favoured by the English law.

It may not be improper to subjoin some further observations upon the general nature of the subject.

* See Appendix, containing the Madras Regulation of 1802, for referring suits to arbitration.

There are some questions which from local situation, or from carrying reference to the practice and skill of particular professions, cannot, easily be judged of in a court of justice.

Wherever a loss or damage has been sustained, and where such can only be estimated by a view of the subject itself; as where the corn fields of one neighbour have suffered from the irruption of the cattle of another; or where a damage to the crop on the ground has arisen from the banks of a reservoir not having been kept in repair, arbitration is, no doubt, a fair and equitable mode of appreciating the value of the original subject, and declaring the reparation which ought to be made.

Wherever the matter in dispute turns upon the custom of merchants, or the usage in trade and business, and involves rather a question of professional skill, than one of pure law, arbitration must be regarded as a convenient and useful mode of decision. It is occasionally employed in this way with advantage in great capitals, such as London and Amsterdam, where an extensive circle affords a large field for selection, and where men of intelligence and integrity can always be chosen to decide. On the Continent, where, from the want of regular juries, arbitrators are more generally employed than in England, their decisions are, chiefly, confined to subjects

of the above nature. They are rejected as incompetent judges in all cases of a criminal nature. They are excluded from causes which from their delicacy and importance ought only to be settled in a regular court of justice. The inconveniency that must arise from decisions being passed by illiterate men has led to the practice, in some states on the Continent, of submitting the reference to the advocates of the parties,* or to the judge of the court.† The civil law has, indeed, excluded the judicial character from all cognizance in this way; but the conveniency, or supposed conveniency, (for the policy has been much questioned,) has led to the practice in France under the old Government. From such decision an appeal lay to the Supreme Court, on the score of partiality or corruption.

Every institution that carries reference to the important interests of individuals becomes, in a civilized state of society, subject, in the course of time, to a variety of distinctions and refinements. We accordingly find, that arbitration formed an important title in every code of law on the Continent. The rules, which regulate the proceedings, and determine the validity of the decree, are numerous and intricate. It is deserving of particular remark that arbitration

* V. Censura Forensis, part 2, B. 1, c. 17, s. 7.

† See Domat's Civil Law, v. 2, p. 625.

does not form part of any of the modern codes of law on the Continent. It is mentioned with disapprobation in the Prussian code. It is not included in the code of the Empress Catherine of Russia. The first volume of the code Napoleon having only come under our observation, we cannot speak as to its introduction in France.*

The introduction of arbitration, as a proper mode of settling disputes in India, is chiefly grounded on a consideration of the litigious disposition of the natives. Admitting the fact, the inference does not follow. Litigious people are never disposed to give up any part of their rights. They seldom refer their disputes to arbitrators, and they seldom abide by their decree. Mild and peaceable men only are inclined to adjust their differences in a friendly way. A truth

* Since writing the above, we find in the American Review for October 1811, a translation of the commercial Code of the French empire. It is enjoined that all disputes between partners in matters relating to the partnership shall be determined by arbitrators. The parties may appeal from the award of the arbitrators. The parties are to deliver their memorials and vouchers to the arbitrators, without any judicial formalities. An award must contain the reasons on which it is founded. The other rules are nearly similar to those adopted in England. But by the right to appeal generally, the process before the arbitrators is made to resemble a first trial in an inferior court. We do not find arbitration enjoined in the commercial Code to any subject besides the above.

which the observation of every one, as to what he sees passing in common life, will sufficiently illustrate. An ancient magistrate of Antwerp,* writing in reference to this subject, has observed to the following effect. "Arbitration is chiefly "useful amongst persons who are entirely dis- "posed to submit their disputes to that mode of "decision, who are sincere in their disposition, "and who only desire to obtain their own, in a "direct way. But amongst those who are re- "luctantly brought to enter into a submission, "and who are malignant in their feelings, this "mode of decision is more difficult than by a "regular trial in a court of law. And from the "award being so often rejected, suits and conten- "tions are rather multiplied than allayed." He subscribes to the opinion of Seneca, that it is better to refer a good cause to a judge than to an arbitrator.†

* Typæus, see his Work entitled Index, page 63, Antwerp 1633. He is spoken of by D'Aguesseau as a writer of great merit.

† A good cause had better be referred to a judge than to an arbitrator, because the judge has a constant rule and order to proceed by, which he must not transgress; but the other having full liberty to judge according to his conscience, may retrench or add something, and pronounce sentence, not according to the rigorous laws of justice, but as humanity and piety shall direct. *De Beneficiis*, l. 3, c. 7.

The justice of these observations will be found illustrated in the latest English publication on the law of awards. In bringing his work to a conclusion, the author has expressed himself as follows:—

"Were the parties submitting always certain "of appealing to a judge of perfect wisdom and "incorruptible integrity, arbitration would be "highly beneficial to the society; but which, "from the weakness and depravity of men, fre- "quently becomes the instrument of the most "flagrant injustice, and the most serious op- "pression. From the manner in which arbitra- "tions are often conducted, the parties, instead "of obtaining a speedy determination to their "disputes at an easy expence, are frequently "altogether disappointed, by having no determi- "nation at all, and frequently involved in a most "expensive and tedious litigation, which might "have been avoided, had they chosen, at first, "to have recourse to the ordinary tribunals of "the country. The only subjects which are pro- "per for arbitration, seem to be long and in- "tricate accounts; disputes of so trifling a nature "that it is of little importance to the parties in "whose favour the decision may be given, pro- "vided at all events there be a decision; and "questions on which the evidence is so uncer- "tain that it is much better to have a decision,

" whether right or wrong, than that the parties " should be involved in continued litigation."*

Thus it would appear that arbitration had in every country been found alike defective as a general remedy.

The importance of Pinchayeets has been raised by comparing them to an English jury. But the two institutions bear no resemblance to each other. They are essentially different. They differ in the number of judges, in the mode of trial, and in the effect of the judgment. The distinctions will be best seen by simply stating the constitution of each.

A Pinchayeet, as the name imports, is in general made to consist of five persons chosen by the parties, to determine a matter of right, whether involving a question of fact or of law; or a question composed jointly of both. They are understood to be chosen from amongst the friends of the parties; and are not bound down to any rules, or forms in their mode of inquiry; nor are they assisted by any legal adviser. In fact, their mode of proceeding is only regulated by their own discretion. Their judgment is not final, but open to appeal to the Aumildar.†

* A Treatise on the Law of Awards, second edition, by S. Kyd, Esq. page 392.

† As an appeal lay from the judgment of the Pinchayeet to the Aumildar, or person in whom was vested the general admini-

Juries are chosen by the sheriff. They are supposed to be indifferent persons, that is to say, equally unconnected with either of the parties. They are liable to be excluded from sitting, on the very idea of their being more favourably inclined towards one than towards the other. The facts of the case are regularly laid before them, and every argument and principle of law is urged on the one side, and contended on the other, by the counsel of the parties. The judge on the bench superintends the trial, takes care that no improper facts, or matter foreign to the subject, is given in evidence. He sums up the testimony of the witnesses, remarks upon its credibility, states the law of the land as applicable

nistration of revenue and justice in the province, the trial was, after all, a mere form. The losing party might always appeal, and the Aumildar might always reverse. Thus, corruption might ultimately carry any point.

In a corrupt state of society, the number of appeals is no check; they rather give occasion for additional extortion by men in power. The inhabitants of the Roman provinces are said to have regarded the circumstance of a governor being liable to be tried on an appeal for extortion, after his return to Rome, as a real hardship on them. He thus came to be obliged to make two fortunes in the province by the oppression of its inhabitants: the first for himself, and the second was required for his judges, in order to secure the former. The case is similar with the Bashaws under the Turkish Government; and every one acquainted with Indian history must know that one great cause of extortion under the Native Government, by the Aumildars and Renters, was that they were obliged to provide presents for the Durbar, in order to hush up complaints.

to the question, and in fine, furnishes them with every assistance which, learning and experience can afford, in order that they may pass a true and perfect verdict. Although the opinion of the judge is not binding upon the jury, yet it is seldom that they decide in opposition to it.

If there has occurred any error in the course of the trial, as, if the judge has allowed improper evidence to go before them, a new trial may be obtained. How many new trials may be obtained in a civil case, is not, perhaps, clearly settled. The court, it is said, will grant any number of new trials, if the jury find a verdict contrary to the established law.* A new trial, accordingly, is often given. Indeed one of the greatest advantages ascribed to the trial by jury is, that it may be repeated and renewed until a proper verdict is given.

The above two views of a Pinchayeet and Jury admit of no comparison. The trial in one case is completely regulated by law. In the other, it is entirely left, without any legal assistance, to the feelings of illiterate and partial men. For who can be more illiterate than the natives of India in general are, and who more partial than the friends of the parties themselves?

But a Pinchayeet, it has been said, may be

* New trials indeed are not granted in any criminal case, nor in offences greater than misdemeanor. *Blackstone, v. 3. c. 24. Note by Mr. Christian.*

confined, until they agree on their verdict. This is certainly repugnant to the general practice. And some difficulty, it is believed, will be found in carrying it into effect. The parties are seldom prepared with their proof; they are tedious in their details; the enquiry, therefore, will seldom be terminated in the course of one day. But what advantage is to be gained by their being shut up? A jury, when they retire, call to recollection the arguments of the counsel, and the observations of the judge. But a Pinchayeet has received no advantages of that sort. Five illiterate men do not enlighten each other, by comparing their doubts; on the contrary, they only confound the subject and embarrass the decision by their mutual difficulties.

A jury is shut up to prevent their being approached by the parties, and until they agree in their verdict; such agreement or unanimity being essential to the constitution of the trial. But neither of these reasons apply to a Pinchayeet. In the first place, a Pinchayeet has been already approached by the parties. They are chosen from amongst their friends and caste, under a confidence that they will decide in their favour. If corruptible, they have been already tainted. It is in vain, therefore, to shut them up, in order to preserve their integrity. And in regard to unanimity, it was never considered necessary that arbitrators should be unanimous. The very

attempt to make them so, would be considered as a restraint upon the free exercise of their judgment, and a violation of the institution.

Two remarks, derived from practice, deserve to be subjoined. The award made by arbitrators is either final, or it is not. If it is final, too much power is granted to them. A condition to abide by any decision is held dangerous in any civilized state of society, because it introduces discordant and uncertain rules of right, and because it opens a door to corruption. On the other hand, if the award is not final, and is open to appeal, there often arises more trouble and waste of time, in judging of the validity of the decree, in a court of law, than would have been necessary to have tried the original suit.*

But the evidence of historical facts will, perhaps, have more weight with some persons than mere legal reasoning. It may be proper, therefore, to notice a late publication, purporting to be a Sketch of the Sikhs. The author informs us, "that trifling disputes about property are set-

* In the justness of the first remark we are supported by the opinion of a learned civilian, Dynees *de regulis juris*, reg. 27. sec. 10.

Of the truth of the second, any person may be satisfied by turning to the English Treatise on Awards, already quoted.

How the decision of arbitrators may lead to further trials, see the famous case of Carse, in appeal before the House of Lords, in the year 1784.

" tled by the heads of villages, by arbitration, and " by the chiefs."

But admitting the fact, that arbitration is in use amongst the Sikhs, it does not, therefore, follow that it should be also used in the populous and mercantile provinces of Bengal, Madras, or Bombay.

" It cannot be supposed that the same ma- " chinery will administer the government of a rich " and populous, a trading and manufacturing " country, as has served for the same country when " poor and thinly inhabited, without trade or ma- " nufacture."*

The justice of this remark is too obvious to require the aid of particular authority; but it will not suffer from being known to proceed from a virtuous and learned chancellor, when speaking in reference to an additional number of judges required in our courts of equity, from the encreased and multiplied relations of our commerce. A Pinchayeet may be very well suited to the Sikhs. But we are not Sikhs. A law, said the ancients, may be very good at Sparta, and yet bad enough at Athens.

In a note to the Sketch of the History of the Sikhs the author states, " It is usual to assemble " a Pinchayeet, or a court of arbitration, in every " part of India under a Native Government, and

* Observations on the project of creating a Vice-Chancellor in England, ascribed to a noble lord, page 9.

" as they are always chosen from men of the " best reputation in the place where they meet, " this court has a high character for justice."

At the period of our commencing this enquiry, we were not so fortunate as to possess Sir John Malcolm's book; and we were led to believe that it contained nothing more on the subject than the above quotation, and a note in reference to it.

But great was our astonishment on finding the following passage in the text:—" The adminis- " tration of justice, in the countries under the " Sikhs, is in a very rude and imperfect state; " for though their scriptures inculcate general " maxims of justice, they are not considered, as " the Old Testament is by the Jews, or the Koran " by the Mahomedans, as books of law; and, " having no fixed code, they appear to have " adopted that irregular practice, which is most " congenial to the temper of the people, and " best suited to the unsteady and changing cha- " racter of their rule of government. The fol- " lowing appears to be the general outline of " their practice in the administration of justice." " Trifling disputes about property are settled " by the heads of the village, by arbitration, or " by the chiefs: either of these modes, sup- " posing the parties consent to refer to it, is " final, and they must agree to one or other."

More than one observation occurs here.—In the first place we ask, if the Pinchayeet trial

was so excellent, how comes it that the general administration of justice in the country was so rude and imperfect? Why are Pinchayeets only employed in settling trifling disputes? Do men employ the best means of settling petty causes, and yet neglect to use the same means, when evidently in their power, to determine the most important questions? The arbitrators, the note says, are always chosen from men of the best reputation. Do men, then, when they look out for arbitrators, attend only to the circumstance of character? Do they never prefer their friends? Thus, the history of the Sikhs, as given by Sir John Malcolm, when the whole context of the book comes to be brought under view, establishes nothing in favour of the Pinchayeet system.

The question as to the existing law of a foreign country is a question of fact; and must be decided by evidence. The most distinct account that has been given to the public of the former administration of justice, in the provinces of Bengal and Bahar, by the Native Governments, is to be found in the Report of the Committee of Circuit (of which Mr. Hastings was president) to the Council at Fort William, dated Cossimbuzzar, 15th August, 1772. From this it appears that there existed, under the Mahometan government, a regular establishment of courts of justice. These courts consisted of various magistrates, possessing different degrees of authority. But

no allusion is to be found to Pinchayeets. Arbitrators, it is stated, only existed by reference from the other courts. "From this list," says the report, "it will appear, that there are properly three courts for the decision of civil "causes, (the Canongos being only made arbi- "trators by reference from the other courts,) "and one for the police and criminal matter."

The collector of the ceded districts,* in his Report to the Revenue Board of Madras, of the 15th of August 1807, has expressed himself as follows:—

"The judicial code, in civil cases, authorizes "trial by referees, arbitrators, and Munsifs, but "says nothing of trial by Pinchayeet. It seems "strange that this code, which has been framed "expressly for the benefit of the natives, should "omit entirely the only mode of trial which is "general and popular among them, and regarded "as fair and legal, for there can be no doubt "that the trial by Pinchayeet is as much the "common law of India in civil matters, as that "by Jury is of England; no native thinks that "justice is done where it is not adopted, and in "appeals of causes formerly settled, whether "under a Native Government, or under that of "the Company, previous to the establishment of "the courts, the reason assigned in almost

* Lieutenant-Colonel Thomas Munro.

" every instance was, that the decision was not " given by a Pinchayeet, but by a public officer, " or by persons acting under his influence, or " sitting in his presence. The native, who has a " good cause, always applies for a Pinchayeet, " while he who has a bad one seeks the decision " of a collector, or a judge, because he knows " that it is easier to deceive them. It may be " objected that a Pinchayeet has no fixed con- " stitution, that the number of its members may " vary from five to fifty, or even more, and that " its verdicts are often capricious. But all " these objections formerly lay against juries, " and they might unquestionably be removed " from Pinchayeets by future improvements."

Thus far the report; and as it has attracted a good deal of attention, it may be proper to observe upon it at some length.

The judicial code for the Madras Establishment was published nearly five years antecedent to the date of this report. In regulation twenty-first of 1802, will be found the law for authorizing, encouraging, and rendering effectual, trials by arbitration. So much for the accuracy of the first objection.*

* It has already been observed that Pinchayeet is the Hindoostannee term for Arbitration. It is thus rendered in Mr. Gilchrist's excellent Dictionary of the Hindoostannee Language:—Arbitration, Pinchayeet; Arbitrator, Punch.

A Pinchayeet having no fixed constitution, no determined mode of trial could possibly be defined in the regulation. And, indeed, if it was as much the common law of India as the jury trial is of England, no fixed law for it was necessary.

In another part of the report it is implied that the trial by Pinchayeet was done away. The natives, it is alleged, cannot with any foundation be said to be judged by their own laws, while the trial by Pinchayeets to which they have always been accustomed is done away. But this observation is founded on an entire misconception of the regulations. There is no enactment in the code which expresses such abolition. It is not so enacted in point of fact, nor implied in point of law. The principle, throughout the regulations, is clearly this—every part of the ancient common law of India, which is not expressly abrogated and annulled, is understood to be left. This principle is incident to every new code of laws, and is, or ought to be, perfectly recognized both in Bengal and Madras.* To what length must the regulations have been extended, if every institution of the natives,

* Quicquid autem hac lege specialiter non videtur expressum, id veterum legum constitutionumque regulis omnes relictum intelligant. *C. l. 7, t. 62, l, 32, s. 6. Vide Secarez de Legibus, l. 6, c. 27, s. 6.*

every private or public right, had come to be re-enacted in the form of an express law.

It might, with equal propriety, be alleged that nothing is enacted as to the ceremonial of their common law, in the mode of giving effect to adoption, or to any other general rite or privilege.

It has been an object in every country, where the principles of legislation are understood, to leave it to the choice of the suitor to apply to whatever court he pleased for justice. In Europe this principle is productive of a wholesome rivalry between the courts of similar jurisdiction; whilst it gratifies the feelings of the suitor, in being allowed to make choice of his judges. Restraint of all sort is painful to the mind, and accordingly had the regulation expressly enjoined a reference to Pinchayeets, to the exclusion of a trial in the Zillah Court, no more likely mode could have been devised of rendering them disgustful. If this mode of trial was so great a favourite of the natives, there was certainly no occasion for a particular law requiring them to observe it. Men do not require laws to compel them to follow their own interest.

But, if this was the established jury trial of India, it is rather surprizing that it has never been described as such, in any of the various works which have appeared on the subject of Indian jurisprudence. We find no mention of

it in the works of Sir William Jones. It is not included in the Institutes of Menu, nor in the *Poote* or Code of Gentoo Laws. It is not alluded to by the committee which sat to inquire into the administration of justice in Bengal in the year 1772. It does not appear noticed in any of the reports on the judicial system otherwise than under the name of arbitration, and which has seldom been mentioned with approbation. No traveller, ancient or modern, bears testimony to the fact. Such a general silence negatives the supposition. Had a trial in this way been the common law of India, the fact must have been known to Europeans many years ago. It must have been brought under observation on various occasions, in different parts of the country, by a cloud of witnesses.

The trial by jury is altogether inconsistent with the principles of a despotic government. This observation is illustrated by a writer who had particularly directed his attention to the origin of juries in different countries. "It is observable," he says, "that where this mode of trial "by *many*, in any degree obtained, there public "liberty was cherished, which is the reason why "we never find this institution in any despotic go- "vernment, either ancient or modern; for indeed, "how could the deliberate and free judgment be "admitted in this case, in a state where every "thing else was determined by the absolute will of

"*one?*"* Indeed, the circumstance of an appeal being open from the award of the Pinchayeet to the arbitrary order of the Aumildar, or head revenue officer in the district, destroys at once all resemblance to a jury trial, and reduces the whole to a mere shadow. For, as already observed, the losing party might always appeal, and the Aumildar might always reverse.

But it is said, that the institution of a Pinchayeet is susceptible of improvement. If it be, however, of such ancient standing, and of such acknowledged utility, the attempt to improve might be a dangerous experiment. The best laws are those which have been introduced by the voluntary act of the people, without the constraint of legislative enactment. They appear to have been dictated by their wants, and to have sprung from the circumstances under which the people using them were placed. And in point of fact, this is the origin of arbitration in India. It was dictated by the necessities of the people, in the want of all judicial remedy, and existed no longer when that remedy was supplied by our Government, in the establishment of regular tribunals.

It will, however, be found that the improvement given to this mode of trial is infinite, since

* An Enquiry into the use and practice of Juries among the Greeks and Romans, by J. Pettingal, page 3.

the regulations were passed. The award becomes a decree of the court; and can now be carried into effect without resorting to the influence of money, which was always required in a Native Government, if the award of the arbitrators was resisted by one of the parties.

A reference to the Bengal and Madras regulations will show that no restriction is laid upon the parties, as to the number of arbitrators whom they may wish to choose, and that every means has been adopted, that could tend to render their proceedings regular and precise; by granting them authority to summon witnesses, to administer an oath, to punish contumacy, and to adjourn the inquiry, whilst bonds are required to be entered into to abide by the award, which becomes a decree of the court. Under no Native Government have arbitrators ever enjoyed such efficient powers. Powers equal to the discharge of every necessary and legitimate act, and which are only bounded not by the incapacity, (for that must always be impossible) but by the want of authority to do that which is wrong. Improvement is, or ought to be, a favourite object in every code of law. But they who call for it here, ought to remember that where a usage springs from the condition and circumstances of the people, when you improve the latter, you meliorate the former.

The habits of barbarism spring from the condition of Barbarians. The rude institution is suited to the uncultivated state of society.* But confer on a people so circumstanced the rights of freedom and property under the protection of equal laws, and they soon adopt the habits of cultivated life. Law is the child of property; and a man has no sooner acquired the latter, than he sets his mind to work, in contriving how he shall best secure it to himself, and to his posterity, by all the advantages of legal instruments and judicial decrees.

* Brantome says, that Henry Montmorency, Chancellor of France in the time of Henry the Fourth, always signed with a mark. "With my constable," said the king, "who cannot read, and my chancellor, who does not understand Latin, there is nothing which I do not undertake with success."

We learn from Hottoman in his Francogallia, that Louis the Ninth decided causes in a very summary way. He would go to the Park of Bois de Vincennes, and sitting down upon a green sod, at the foot of an oak tree, would command us to sit by him; and there, if any one had business, he would cause him to be called, and hear him patiently. He would often himself proclaim aloud, That if any one had business, or a controversy with an adversary, he might come near, and set forth the merits of his cause; then, if any petitioner came, he would hear him attentively; and having thoroughly considered the case, would pass judgment according to right and justice.—*Francogallia, page* 142. These arrangements might have been well enough for the circumstances of the times, but they would not entirely answer for the city of Paris of the present day.

The general progress of society carries every thing along with it. Whilst it enlarges the views of the governing power and renders the administration of justice intelligent and precise, it opens the eyes of the subject to the advantages of regular and learned courts. A Pinchayeet will soon sink into disuse, in every district or town where cultivation is prosperous, where commerce is advantageous, and where an European magistrate holds forth his protection. It has long been forgot in the great towns of Calcutta and Madras. It has sunk before the light of reason, and the gravity of our legal sages. The inhabitants of these towns, sensible of the intelligence and integrity of European magistrates, do indeed sometimes apply to them to settle amicably their disputes, without the exposure of family differences in a court of justice. It is distinctly known, that the natives, from a distrust in the integrity of the Indian character, always give the preference to the arbitration of an European; and, from the intricacy of their laws, desire that the arbitrator should be a man of the legal profession. These two facts involve much matter for comment. But we shall leave them to the inference of the reflecting mind.*

* It is a very ancient remark, that arbitration can never prevail but where there exists a confidence in the general integrity. But there is no confidence amongst the members of a corrupt society.

It has been asserted, that the judicial regulations have been too suddenly introduced. How far this has been the case, it is not necessary here to enquire. But certainly the complaint in the report, that a Pinchayeet was not provided for, is, of all other charges, the least grounded. Wherever it was to be found, it existed as a custom or local usage. But a law should never interfere with a custom; for if the custom be good, the law must be bad. The great object of the code of regulations has been to preserve the usages and laws of the Natives. No innovation on any innocent institution has been attempted. It were superfluous to attempt to ameliorate what the people have already declared to be good. Who shall determine the various improvements of which a Pinchayeet is susceptible? It would require a very nice knowledge of jurisprudence to determine what forms are best; what number of judges is most convenient; how many trials shall be granted, if the decision is wrong; what degree of unanimity amongst the judges is necessary to give validity to the award. These are questions incident to any scheme of improvement. But they are questions of very difficult solution, on the principles of natural equity; and which it might be still more difficult to solve in a manner satisfactory to the prejudices of the natives of India.

To many persons, arbitration appears to afford a very facile administration of justice, as every thing appears facile to those who do not attend to its difficulties. Yet the following question has long excited the curiosity, and divided the opinions, of the ablest jurists. Of three arbitrators, one adjudges the party cast to pay a fine of five crowns; the other ten; and the last fifteen. What is the amount of the fine? The question is susceptible of different solutions. But so that it is solved, perhaps it is a matter of no importance how. It is only making the party pay twice as much, under one construction of the award, as what he would have been liable to do, under another. In Turkey, says Montesquieu, all causes are one way or other quickly decided. The method of determining them is a matter of indifference, provided they be determined. The classing of the votes is a fruitful source of difficulty. The inequality in the original number of the arbitrators will not always prevent this. Of seven arbitrators, two award one penalty, two another, and three discharge the complaint. From having no common instructor or common rule to regulate their opinions, each votes on his own view of the case. To reconcile their discordancies is often a matter of extreme difficulty. The rules laid down in this respect, by former writers on natural law, are either

wrong, or have been found inconvenient, as they have been laid aside in modern practice.*

* We are supported in the above reasoning by the authority of Mr. Tytler, late assistant judge in the twenty-fourth Pergunnahs Bengal establishment; who has expressed himself as follows.—

"Regarding the introduction of Hindoo judges and Pinchayeets or juries, although we may certainly allow the truth of the observation, that their powers of discriminating between truth and falsehood, in native evidence, are very superior, yet that they could be made serviceable to the administration of justice in the present time, when corruption among the natives is at its height, may be very much questioned. We could not find men worthy of being trusted. It would also add to the present delay, so much complained of. For, not only would it be necessary to afford such proof as would satisfy the consciences of many instead of one; but, if a revision of proceedings were necessary, if any thing of the nature of an appeal lay to the European judge, these appeals alone would furnish him with a sufficiency of business. The natives (of Bengal at least,) have no confidence in native judges: for the proof of which assertion we may look to the files of cases of appeal from almost every decision of a native head commissioner, and from the Moonsifs or petty commissioners." *Considerations on the present Political State of India*, v. 2. p. 146.

CHAPTER II.

On the Subject of Potails and Village Police.

CONNECTED with the late plan for the administration of justice at Madras there is one position too remarkable to be passed over without notice.

The Potail is described as the hereditary superintendent of the revenue, domestic economy, and the administration of justice, in every village in India. He is stated as not liable to any influence from the revolutions of the government. "The Potail is still the collector, magistrate, "and head farmer; whoever rules the province, "they rule the village."* It is therefore conceived that he should be connected with the arbitration of disputes arising within his village; and that he should act as a commissioner in petty suits.

His hereditary connections are supposed to qualify him in a more particular manner for this office, and the superintendence of Pinchayeets.

* Report from the Collector in the Ceded Districts, 15th May, 1806.

We shall not here stop to enquire how far this general local prevalency, " in every village of India," as ascribed to the office of Potail, may not be too extensive. We must confess that we are unfriendly to very general positions, as having a natural tendency to lead to uncertainty and want of precision. And if we are not greatly misinformed, the office of Potail has been long unknown in a very great proportion of the territories subject to the presidency of Madras and Bengal. We shall commence our remarks on the reasons assigned for this employment of the Potail, as founded on the circumstance of his hereditary connections in the village in which he is to administer justice.

There are few plans to be found for the administration of justice, which have not, occasionally, been resorted to. The success, or difficulty, which has attended their execution, naturally gives rise to a train of instructive conclusions.

The appointment of judges to courts of justice in that county, town, or village, of which they are natives, and in which they are connected with the members of the society, by the various ties of affinity and personal interest, has ever been found liable to great objection. The institutions of the most prudent nations has distinctly excluded a man from sitting as a judge in his native district. The Roman Laws are expressly

prohibitory on this head. "As it was reasonably apprehended that the integrity of the judge might be biassed, if his interest was concerned, or his affections were engaged, the strictest regulations were established to exclude any person, without the special dispensation of the Emperor, from the government of the province where he was born. The same regulation" (the historian acquaints us in a note) "is observed in China, with equal strictness and with equal effect."*

We find that a similar regulation was established in France, in 1356. Among the articles of reformation in the administration of justice, it was ordered that nobody should ever be allowed to exercise the functions of a magistrate in the place where he was born.†

And the same principle has been at different times acted upon in different countries in Europe. The jealousy of the English law has disqualified a judge from making the circuit in

* History of the Decline and Fall of the Roman Empire, v. 2. c. 17. p. 39. and note, 4to edition.

† Boulainvillier's Account of the Ancient Parliament of France, Letter 10. p. 71. v. 2; and also during the reign of Philip Le Bel in 1302, as we collect from the note of Gothofredus on the Code, l. 1. tit. 41. At nulli patriæ suæ administratio sine speciali permissu principis permittatur.—See Colvinus on this Law in the Code; he alludes to the exclusion still prevailing in Italy.

his native county. The advanced state of English manners has indeed justified the relaxation of the principle in modern practice, as to criminal trials. It is true that the ancient notion of a jury was that they should be taken from the vicinage. But the idea, although specious in theory, has been found altogether inconvenient in point of practice, and accordingly nothing is more common than to change the venue, or place of trial, to a different county, in reference to the domestic prejudices of the parties. A jury coming from the neighbourhood has in some respects a great advantage, but is often liable to strong objections, especially in small jurisdictions. Blackstone, speaking in reference to local prejudices, observes: "As there may be a strict interest so minute as not to occasion any bias, so "there may be the strongest bias without any "pecuniary interest. In all these cases, to summon a jury, labouring under local prejudices, "is laying a snare for their consciences: and "though they should have virtue and vigour of "mind sufficient to keep them upright, the "parties will grow suspicious, and resort, under "various pretences, to another mode of trial.*

It is not meant to assert that the Natives may not conveniently be employed as municipal

* Vol. 3. page 383.

officers of a town. But their proper duty regards the good order and conveniences of the place.

But it will be said, that the Potails having but cognizance of trivial matters, the danger of corruption is the less. The opposite conclusion is what the history of judicial proceedings in every country warrants us to draw; nothing is more certain, than that the abuse of office is always the most common in trivial and vulgar enquiries. Whatever the cause or causes (for perhaps they are many) may be, which lead to this, the fact itself has been too often experienced to admit of a doubt.

Hereditary judges have always been found defective. They have no motive to cultivate their talents; and without a motive to do so, we know that talent remains in general uncultivated. The idea of permanency, which is annexed to their office, has a natural tendency to render them slovenly in the execution of their duty, and indifferent to the opinion of the public.

It is not meant by these observations to say, that trivial causes should be regulated by the same forms as important ones, or made subject to the cognizance of learned judges. It is only meant to contend that unnecessary difficulties should not be thrown in the way. The natural restraint and checks should not be removed. These are, that personal merit should be sup-

posed to hold out the first claim to selection for the office of a commissioner; and that the right to permanency in the office should be made to depend only on a proper discharge of its duties.

The circumstance of the Potails not being liable to removal, or a forfeiture of their offices, on a change of government, seems unfavourable to their being vested with power and influence. On what else, does the stability of any government rest, but on the opinion, as cherished by its subjects, that they would suffer by any change of masters? What leads to a revolution in any state, but the idea entertained by the people that they will better their condition by a new order of things? If it is a matter of indifference to the Potail who may be the prince, or the governing power, he can have no object to protect one government, in preference to another. The state then gains no additional security by his employment. He may have no interest, it is true, in bringing about a revolution. But that is not the point. Men are not to be vested with power and influence for doing nothing. They, who have not an interest in defending a government, have always an interest in not doing so. They feel naturally disposed to remain neuter, and not to expose their lives and fortunes to danger in the contest. A very leading principle in the judicial system of India must come to be violated by employing revenue officers in the adminis-

tration of justice. "It is obvious, that if the re-
"gulations for assessing and collecting the public
"revenue are infringed, the revenue officers
"themselves must be the aggressors, and that in-
"dividuals, who have been aggrieved by them
"in one capacity, can never hope to obtain re-
"dress from them in another. Their financial
"occupations equally disqualify them from
"administering the laws between the proprietors
"of land and their tenants. Other security there-
"fore must be given to landed property, and to
"the rights attached to it, before the desired
"improvements in agriculture can be expected
"to be effected.*

We find also suggested the revival of a village police. The same objections apply to an hereditary police, who are likewise supposed not liable to removal on a change of government. The great object, perhaps, of the police at present, is to give early notice of the formation of any plot amongst the country princes, or amongst the disaffected class, whoever they may be, of our subjects. Now, this will always be best done by a police who are entirely dependent for their office and pay on the circumstances of the day; by men who feel that they only exist by particular favour, and that they would suffer on any change, and be discarded to make room for the

* Preamble to Regulation 2nd. of 1793.

favourites of a new government. It is on a similar principle, that foreign guards have occasionally been employed by almost all new governments, as the best protectors of their interests.*

These establishments, we are always told, formed part of the Old Native Government of India. Perhaps so. But the old governments of India were all ruined by these establishments, and fell victims to the weakness of their internal policy. From the high encomiums that have been bestowed on Potails and hereditary police, one might be led to suppose, that they had saved some sinking state, or prevented the downfall of some declining monarchy. But those states, which have hitherto employed their agency, have all fallen; and ours has, as yet, been happily supported without their assistance.

To protect the religious prejudices of the natives, may be an object of policy. But to adopt the civil institutions of their government, can seldom, if ever, be so. On what does the superiority of our administration depend, but on the system of discipline, bordering on military feelings, which we have introduced into every

* Nothing is more certain than that under the former village police, deserters frequently made their escape; and foreigners found no difficulty in travelling, with a slight disguise in their dress, from one end of India to the other. See the printed account of Bristow, a soldier belonging to the Bengal artillery, who escaped from one of Tippoo's prisons.

department of office? A village police is never susceptible of this discipline. They are still villagers, householders, family men as they call themselves, and as such, are wanting in that spirit of enterprise, which is essential to the prevention and detection of crimes.

How different the active and watchful Peons, who have been educated under the inspection of the managers of the Calcutta police. How uniform and intelligent the system which prevails in that town; and how superior, in every respect, when compared with the slovenly and corrupt practices of a Native police, in any of the towns of the Indian princes.

There is, perhaps, no part of our Indian establishments that reflects more honour on the energy and intelligence of the European character, than the police of Calcutta. There is no other establishment which distinguishes our government more happily, from the usages of a Native prince. It is now some years since the writer had first occasion to observe the police of that town. He was forcibly struck, on entering the office, in observing the multitude of people that stood in attendance from almost all quarters of the globe; the order and silence that prevailed; the rapidity with which business was dispatched; and the acuteness and intelligence with which the orders and decrees were issued. The gentlemen employed in it were, in general,

if not all, members of the legal profession; and some of them had obtained a very distinguished place in the class of advocates at the Calcutta bar.

The sagacity of a distinguished Governor-General had early led him to perceive the advantages to be derived from the employment, in this way, of men of the first talents, and the most practised habits of business. The expence of the establishment was, perhaps, considerable. But, in a commercial and opulent country, the expence bestowed by a government in the administration of justice, and the maintenance of good order, is amply recompensed by the increased comforts and wealth of the inhabitants.

Let the efficiency of this police be compared with the establishment of a Native Government. In the one is to be found energy, method, integrity, and address, productive of security and dispatch. In the other, corruption, languor, and a total ignorance of every principle of virtue and good government.

But it has been said, that the native police is degenerated, and that it was more perfect at a former stage of their government. At what stage was this? To what period shall we revert for information? Let us not be asked to go further back than the first arrival of Europeans in this country. The accounts preserved of the first landing of the Portuguese in India, at Calicut,

and of the tricks practised on those strangers by the Cutwal, exhibit a perfect picture of the venality and intrigue of a native Indian police. The Indian character was the same at that period as it is to-day; and it is the same to-day, as it has been at the remotest antiquity of which we have any accounts. Or, admitting the fact that the Indian character is degenerated, is that any reason to revise two of their institutions, to the consummation of which character and moral habits are so essential? If these institutions were feeble when their character was good, they must be still more so, now that their moral habits are depraved!

As to any argument in favour of these two offices, as founded on hereditary right, the question is a very delicate one. The hereditary rights of the natives are but too many; and it is not perhaps the wisest policy to revive them.

It was once a question of great moment, how far India should be governed through the medium of its hereditary rulers. But a succession of events has long since laid that question at rest; and perhaps the greatest danger to which the country could now be exposed, would be in a revival of dormant claims, and a revision of the rights of the natives.

It is to be observed, that at present the village police does not exist; nor does, in many parts of the country, the office of Potail. Had the ques-

tion been, how far an existing establishment should be continued, the argument would have been different. But the question now is, as to the propriety of reviving a dormant and extinguished claim. To replace men in authority of which they have once been deprived, is always dangerous. The return of office is accompanied with feelings of resentment. The blood-thirsty man is he who returns from banishment to power, said the Roman proverb. The justice of this remark is too fully illustrated by late events in the revolutions in France, and in other parts of Europe. And the human feelings are every where the same.

It is dangerous to transplant a leading principle of one system of government into another differently constituted, because the principle, in the system to which it originally belonged, may have been counterbalanced by various checks, which are not to be found in the other. A Potail might have no motive of disaffection toward a Hindoo government. He was bound towards it by a variety of ties; by the influence of religion and caste, by habit, and by many affinities. But all these principles of action are not only wanting in regard to an European government, but they are even counteracted by various opposing sentiments. We are foreigners, heretics, aliens in point of language, habits, and customs.

Under the country governments, the duties of the police were confined to a very few objects, such as watching the baggage of a traveller at night, going in search of stolen goods, or in the pursuit of thieves. But with us they are employed in a variety of departments; they have the charge of the jails, and the custody of all prisoners; they are the common organ of all verbal orders from the magistrates; they protect the persons and courts of the judges, and they are in fact the civil guards of the state. Their number, power, and influence, are therefore very extensive, and pervade all the judicial and revenue establishments. A corps of this sort, in the occasional absence of the military, may command or dispose of the inhabitants and revenues of a whole province.

The danger to an arbitrary government, (and such, to a certain degree, every Asiatic and foreign government must be) is not always from the hostile sentiments of its principal subjects, or noblesse; but from the great body of the people, the yeomanry, and cultivators, feeling their strength, being sensible of their rights, and possessing the means of union and combination. The French Government stood secure amidst the cabals of a race of princes, and the factions of a thousand families of noblesse, whilst surrounded by a drooping servile peasantry. But the moment that the condition of the mass of the people

was improved, and they had become sensible of their rights, and were possessed of the means of union and combination, the monarchy fell before the natural strength of numbers. In India, we have triumphed over all the princes of the country. Our future contests, therefore, (if such we are destined to have) must be not with the few, but with the many. The equity of our laws has a natural tendency to introduce an equality of rights amongst the people. It is hardly possible to prevent the operation of this principle to a certain degree.

The right that we have given to the natives in the soil, and the right of purchasing and transferring property in land, are calculated to produce a spirit of independence. It is an unquestionable truth, that empire follows the balance of property; and, wherever this balance is in favour of the people, it will be accompanied with all the natural influence of wealth. If the general property of a whole province is in the hands of a numerous class of men, (whether you call these Zemindars, or by whatever other name,) they will also possess a proportioned degree of influence and command over the attachments and services of the inhabitants.

If a spirit of liberty is to distinguish (and may it long continue to do so) our government in India, its tendency ought at least to be counteracted by the natural balances and checks. It is

in vain to suppose that we can confer on the natives the liberty of Europeans, and yet command their obedience, through the feeble institutions of their Hindoo princes, institutions only known to us by the ruin which they have brought upon all the states which have employed them. The government should be regarded as the fountain of honour, and as the source and spring from whence the right to office is derived. The number of places, which any prince has to bestow, has always been found to constitute one of the first springs of his government, and to be, in fact, the best safeguard of his throne. In the old French Government, during the reign of Louis the Sixteenth, a variety of offices depending on the crown, were cancelled and done away with as forming a useless establishment. Their use was not perhaps very great. But this abolition was, in fact, (as it was afterwards discovered,) destroying the very props and pillars of the throne. The office of Potail is said to carry a degree of influence superior to what was possessed by many of the native princes. The Potails are therefore a sort of tribune, on whose influence over the people, under particular circumstances, it may be difficult to calculate.

It was once a favourite opinion, that nothing was to be apprehended from the combination of the natives. Nothing is certainly to be apprehended under a regular system of policy, and in

the common occurrences of life. But how was it during the period of the disturbance at Vellore? Every inhabitant, every man at the plough, was affected with the same sentiments as the Sepoys. The impression was general. Will it be said, that, under similar circumstances, a native police and municipal officers, possessing the influence ascribed to Potails, and being uninterested in the existence of government, are not dangerous instruments in the hands of the disaffected!

It is not meant to insinuate that the recurrence of such an insurrection is a very probable event. It has however recurred, and to a very considerable degree, and within the short period of seven years, in a similar disturbance at Travancore. Independent of human design, or particular intrigues, disaffection and tumults arise occasionally in every state.

It is the nature of all influence to extend its limits. The influence of Potails may be insignificant at the first creation of their authority, but, the habits of command will imperceptibly give it strength. At present it is little, "but nothing "should be regarded as unimportant which "touches the springs of government."

END OF THE SECOND PART.

APPENDIX.

Extract from the Madras Regulations,

A. D. 1802. REGULATION XXI,

A Regulation

FOR REFERRING SUITS TO ARBITRATION.

THE Governor in Council being desirous to promote the reference of disputes, of certain descriptions, to arbitration, and to encourage people of credit and character to act as arbitrators, the following Rules have been enacted:

II.—In suits that may be brought before any of the Courts of Civil Judicature, concerning disputed accounts, partnerships, debts, doubtful or contested bargains, or non-performance of contracts, in which the cause of actions shall exceed two hundred Arcot rupees, the courts are to recommend the parties to submit the decision of the matters in dispute to arbitration.

III.—In all suits for money, or personal property, the amount or value of which does not exceed the sum of two hundred Arcot rupees, the courts are empowered, with the consent of the parties, to refer the suit to the decision of one arbitrator. The parties, or their vakeels, upon agreeing to the reference, shall, on or before the next court-day, mutually choose some one common friend, or

indifferent person, who may be willing to undertake the arbitration. If the parties shall not agree with respect to the person to be appointed arbitrator, or if the person nominated by them shall refuse to accept the arbitration, and the parties, or their vakeels, cannot agree in the appointment of another person willing to undertake the arbitration, the court, with the consent of the parties, is to appoint as arbitrator in the cause, the proprietor of the estate in which the cause of action shall have arisen; or the farmer, if the estate be held in farm of government; or the cauzy of the pergunnah; or the tehseeldar, or any other creditable person; provided that the person, so to be nominated by the court, be not in any respect interested in the matter in dispute. But if the parties cannot agree in the nomination of an arbitrator, or if the person whom they may nominate, shall refuse to accept the trust, and the parties cannot agree upon the appointment of any other person willing to undertake the arbitration, or shall not consent to the appointment of an arbitrator by the court, the cause is not to be referred to arbitration, but is to be tried by the court, or the register, if the cause be depending in a Zillah court, and the judge shall think it proper to refer it to him for decision. In the event of the parties, or their vakeels, agreeing in the nomination of an arbitrator, willing to accept the arbitration, or to an arbitrator being appointed by the court, the person so chosen or appointed shall be the arbitrator in the cause. The parties however in suits of the nature of those described in this section, are to have the option of choosing two or more arbitrators to decide their cause, in the same manner as the parties in the causes specified in section II.

IV.—The judges of the courts are enjoined to afford every encouragement in their power to persons of character and credit to become arbitrators; but they are not to

employ any coercive means for that purpose, nor to permit any of their public officers or private servants, or any of the authorized Vakeels, to be arbitrators in a cause. In all cases the courts are directed to endeavour, but without using any compulsion, to prevail upon parties to submit their cause to the arbitration of one person, to be mutually agreed upon by them. In every case (with the exception of the cases specified in section III, which the courts are empowered to refer to one arbitrator with the consent of the parties) the parties are to choose the arbitrators, who are to decide the matter in dispute without fee or reward.

V.—Whenever a suit shall be submitted to arbitration, the court in which it may have been instituted, previous to the arbitrator or arbitrators entering on the arbitration, is to cause the parties to execute arbitration bonds, binding themselves to abide by the award, and agreeing that it be made a decree of the court. The court is to fix such time as it may think reasonable, upon a consideration of the nature and circumstances of the case, for the delivery of the award, and the period so fixed is to be specified in the bonds. If the cause shall be referred to two or more arbitrators, the following provisions are to be made for completing the award, in the event of the arbitrators not delivering it by the limited time either from disagreement or other cause. If the decision of the suit shall be referred to two or more arbitrators, whether an odd or an even number, the parties are to have the option of nominating jointly one person as umpire; or if the number of arbitrators appointed shall be three or more, being an odd number, to agree that the award given by the majority shall be final; or to permit the arbitrators to nominate an umpire. The name of the umpire, and the time by which he is to make his award, in the event of the arbitrators not delivering it by the limited period, is to be specified in the bonds,

which are to be executed before the arbitrators enter upon the enquiry. In the event of an umpire being appointed, and the arbitrators not agreeing in an award by the limited period, their authority is to cease from such period, and the umpire is to give his award.

VI.—When a cause shall be referred to arbitration, and the bonds, specified in the preceding section, shall have been executed, the court is to transmit to the arbitrator, or arbitrators, a copy of the bill of complaint, and by a short writing, under the seal of the court, refer to him or them the matters in dispute between the parties. In the trial of the suit, the arbitrators are to investigate the matters in dispute, by hearing the pleadings of the parties, and examining their respective witnesses and documents. The court is to issue the same process to the parties and to the witnesses, whom the arbitrator or arbitrators, or the parties, may desire to have examined, to appear before the arbitrator or arbitrators, and to administer such oaths to the parties and witnesses, as the court is authorized to administer in causes tried before it; and persons not attending in consequence of such process, or making any default, or refusing to give their testimony, or to sign their depositions, or being guilty of any contempt to the arbitrator or arbitrators during the investigation of the suit, are to be subject to the like disadvantages, penalties, and punishments, by order made by the arbitrator or arbitrators, as they would incur, for the same offences in suits tried before the court, provided that the arbitrator or arbitrators shall report the order, with the reason for making it, to the court, and obtain its consent thereto; which is to be signified by the judge or judges signing the order. In cases in which an arbitration may be held at a considerable distance from the court, the court may grant commissions to the arbitrators to administer the proper oaths to wit-

nesses whom they may be desirous of examining upon oath.

VII.—In cases where arbitrators, or umpires, shall not have been able to complete the award by the limited time, from want of the necessary evidence, or information, or other good and sufficient cause, the courts are empowered to allow a further time for the delivery of the award. In the first-mentioned case the courts are to fix a period, by which the umpire (if an umpire shall have been appointed) shall deliver his final award, in the event of the arbitrators not completing their award by the expiration of such further time.

VIII.—When a final award in a cause shall be made, either by the arbitrators or the umpire, it is to be submitted to the court, under the seal and signature of the person or persons by whom it may be made; together with all the proceedings, depositions, and exhibits in the cause. The court is to pass a decree conformably to the award, and the decree is to be carried into execution in the same manner as other decrees of the court.

IX.—The award of an arbitrator or arbitrators is not to be set aside, except it be fully proved to the satisfaction of the court, by the oaths of two credible witnesses, that the arbitrator or arbitrators has or have been guilty of gross corruption or partiality in the cause in which the award may be made.

FINIS.

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